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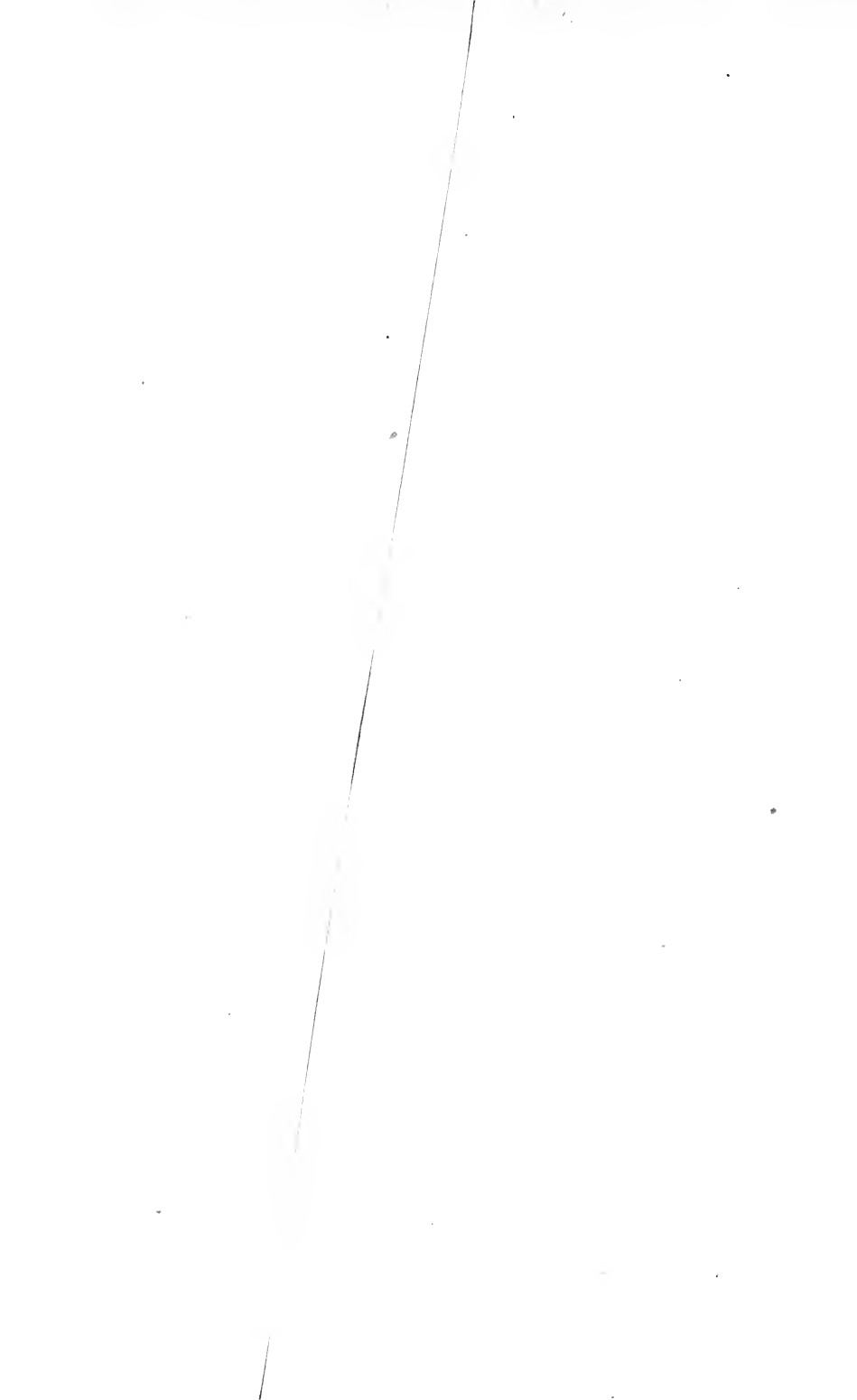
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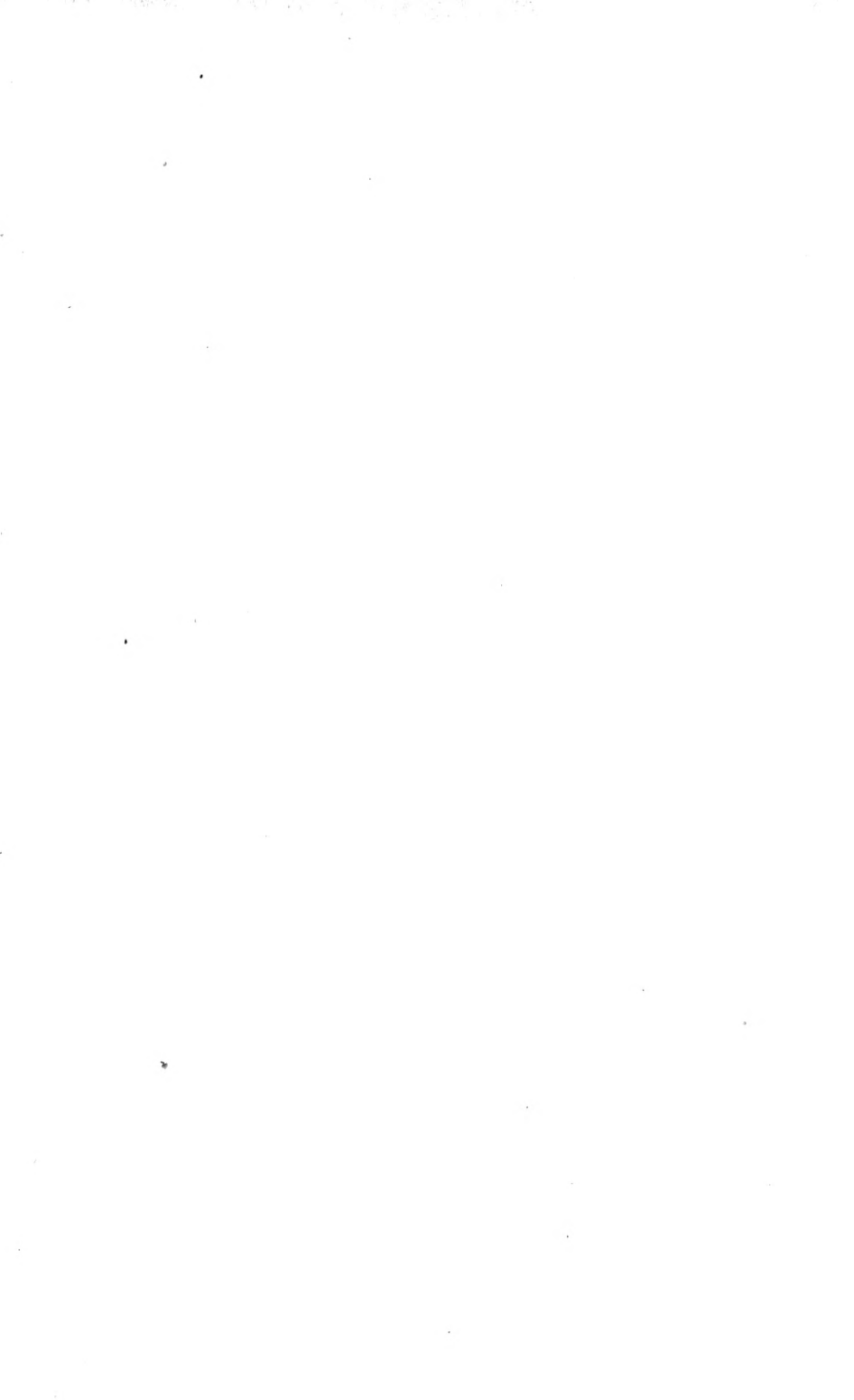
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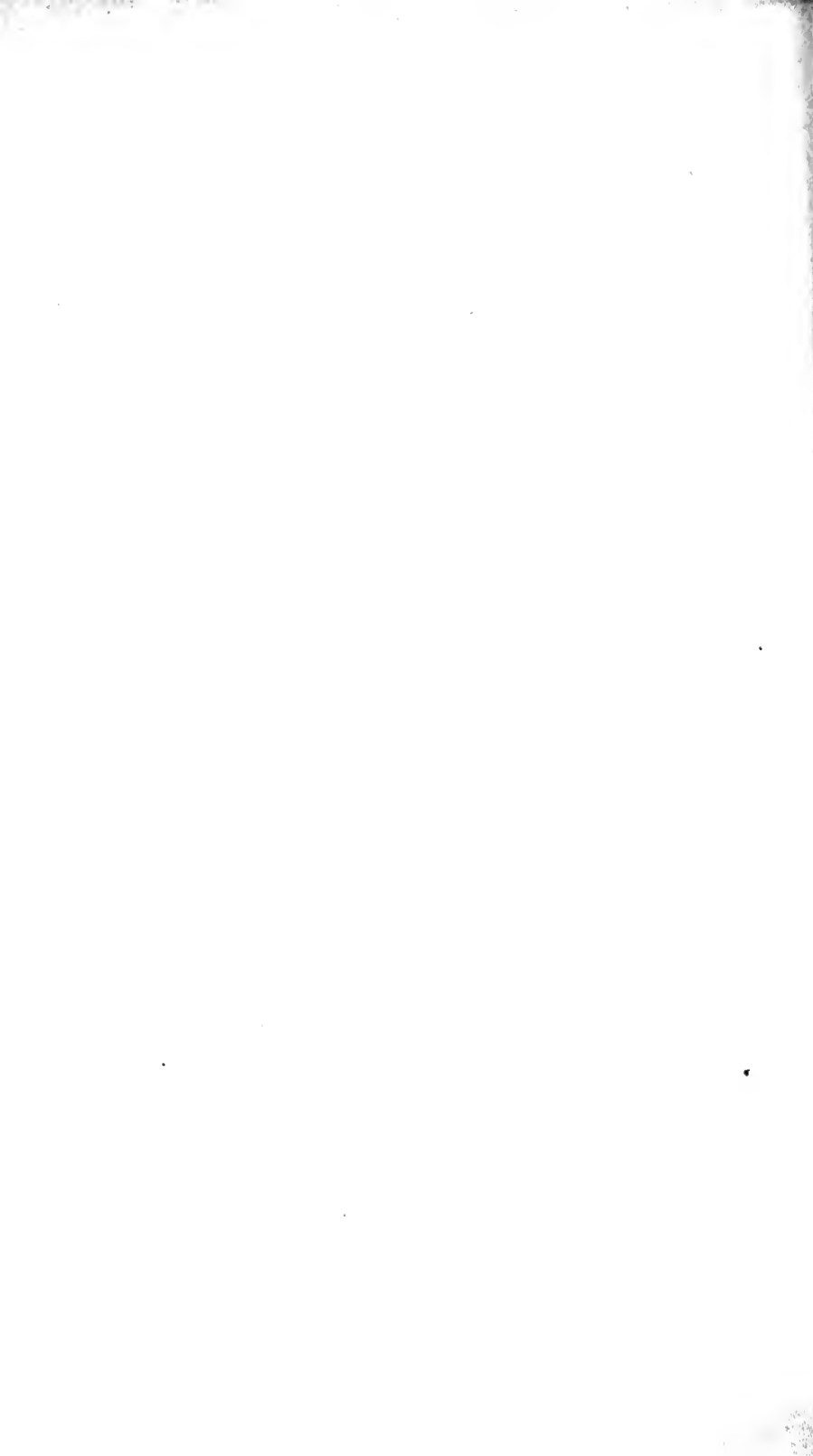
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# PRACTICE AND PLEADING

UNDER

## THE CODE.

WITH

### APPENDIX OF FORMS.

AND

### TEXT OF CODE AND RULES.

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BY

HENRY WHITTAKER.

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SECOND AND REVISED EDITION, IN TWO VOLUMES.

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## INTRODUCTION.

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ENCOURAGED by his former success, the author of "Practice and Pleading under the Code" has felt it due to himself and to the public to issue a second and revised edition, in lieu of the first, which for some time has been exhausted.

Though varied in details, the general plan of the work remains identical. It may, therefore, be convenient to state that plan in the words of the original Introduction, and to mention afterwards the amendments that have been made.

After noticing the various circumstances which induced such an undertaking on the part of the author, the original Introduction proceeds as follows :

"To supply the void thus existing, is the attempt proposed in the compilation of the present work, in which the objects of a Commentary and of a Book of Practice are sought to be combined, in a practical spirit and with practical views throughout. All mere discussion has accordingly been studiously avoided from first to last, so far as was possible, consistent with a due investigation into the various difficulties which have from time to time been raised as to the interpretation of the measure. That so little of insoluble difficulty should have arisen, forms the best eulogium upon the Code itself—effecting, as it unquestionably has effected, a revolution in the previous system, which, for extent and boldness, stands unparalleled in the annals of legal reform.

"The scope of the work may be thus briefly stated : A sketch of the different tribunals of Civil Jurisdiction is first given. The general prerequisites to the assertion of remedies

in those tribunals, is next considered. The progress of an ordinary suit in the higher courts is then taken up, and practical directions given for its conduct and management by both parties, from its first outset to its final result. This important subject having been fully considered in all its branches, the nature and characteristics of special proceedings are shortly adverted to, and the work concludes with a brief notice of the retrospective effect of the Code, and an Appendix of Forms.

“In treating of these subjects, the enunciation of any proposition unsupported by positive authority, has been carefully avoided; and, where the decisions on any given point have been conflicting, the author has stated those on both sides, as impartially as lay in his power, whilst drawing his own conclusion. He has, too, adopted the principle of confining himself to the citation of decisions pronounced under the actual operation of the Code, to the exclusion of cases decided before its passage, or by the English tribunals. Though concurrent on many points, and consistent on more; on others, and those of the most important nature, the old and new systems are at absolute and irreconcilable variance with each other; and *à fortiori*, is this the fact with respect to English authorities. Their applicability is at the best illustrative; it cannot be held to be direct under any circumstances.

“The general tenor of the work presupposes likewise an acquaintance on the part of the student with the elementary and other works in relation to the practice under the old system. For some time to come, this will remain a matter, not of choice, but of necessity, though that necessity will lessen in degree with every recurring year. All details of proceedings governed exclusively by the old system will therefore be rigidly excluded, whilst indicating the sources whence those details may be gathered; and the present work will be strictly and professedly confined to the new, as contradistinguished from the old practice.

“The Code and Rules will necessarily form the subject of constant citation, the more important provisions of the former being inserted in the text. In quoting from the Revised Statutes, the references are made to the marginal paging.

“In preparing the appendix of Forms, succinctness has been

studied, and no attempt made to give precedents of mere statements of fact, apart from those clauses which are of general and not of particular application."

To the plan as thus laid down in the outset, the author has still rigidly adhered. The great doubt which has arisen in his mind has been as to the expediency of incorporating in his work the remnants of the old practice, in relation to special proceedings and other matters unaffected by the Code. After much deliberation, he has decided against this course. The standard works on that practice still form, and must for some time continue to form, an indispensable requisite to the library of a practising lawyer. In those works the settled course of proceeding in these cases will be found accurately defined; whilst the recent decisions, as far as matters of mere practice are concerned, are comparatively few and unimportant. Were there any prospect that the former practice in these matters would be permanently established on any thing approaching to a fixed basis, a refusion of the present information on the subject would be a highly desirable adjunct to a work of this nature. But such is not the case; and, however indisposed, and justly indisposed, the Legislature may be to interfere further with the workings of the Code itself, until time has been given to mature and test the system as it now stands, the same argument does not apply to the balance of the original report of the Commissioners. It is not only highly probable, but it seems even essential to the proper working of the system of legal reform already commenced upon, that the Legislature should make some disposition of the subject as regards the remaining branches of procedure. Whenever this anticipated disposition takes place, the details of the old practice will at once become wholly, as they are now partially, obsolete; and in the meantime they can best be gathered from the existent standard works upon the subject. To compose a supplementary treatise would therefore be an ephemeral labor; and, when composed, that treatise would, in all probability, become speedily an excrescence on the face of a work devoted to the consideration of what has been accomplished, not what is projected. Such a treatise would be either wholly conjectural, on

the one hand, or a mere recasting of already digested information, on the other.

For these reasons, then, the author has determined to adhere to his plan as first laid down. In matters of mere arrangement he has, however, made considerable alterations in the general plan of the work, and which he trusts will be found improvements. The references to decided cases have been brought down to the latest period, and the conclusions throughout subjected to a careful revision in connection with the new light thus thrown upon them. The book has been in fact in a great measure re-written, though with the incorporation in it of the old material. With a view to the greater convenience of reference, the text has been arranged throughout in sections continuously numbered, each section containing a specific subject, and those sections again subdivided into dependent titles, according to the different minor subjects involved in each; and, in accordance with another suggestion from parties of high eminence in the profession, the text of the Code itself has been appended in a separate and integral shape. Additions have also been made to the appendix of Forms, with a view to their greater completeness and utility. These various changes have of necessity increased the bulk of the work, and necessitated its division into two volumes.

The authorities on which the different positions advanced in the text are grounded, and which embrace all cases decided on points of practice, since the original passage of the Code, are as follows :

Comstock's Reports, 4 volumes, cited as "Comst."

Selden's Reports, 1st and part of 2d volume, cited as "Seld."

Notes of Decisions of Court of Appeals, issued in anticipation of the regular Reports, each case being noticed by the date of the decision.

Barbour's Supreme Court Reports, vols. 2 to 15 inclusive, cited as "Barb."

Sandford's Superior Court Reports, 5 volumes; cited as "Sandf."

Duer's Superior Court Reports, 1 volume; cited as "Duer."

Howard's Practice Reports, Vols. 3 to 8 inclusive, and part of Vol. 9 ; cited as "How."

The Legal Observer, Vols. 5 to 11 inclusive, and part of Vol. 12 ; cited as "L. O."

The Code Reporter, 3 volumes ; cited as "C. R."

Do. do. New Series, 1 volume ; cited as "1 C. R. (N. S.)"

N. B.—The balance of the 2d and part of the 3d volume of Selden, a further part of volume 9 of Howard, and additional numbers of the 12th volume of the Legal Observer, will doubtless be received while the work is going through the press, and will be included in the text as far as possible.

With these preliminary remarks, the author submits the result of his renewed labors, in the humble hope that they may be as indulgently appreciated, and as cordially supported by the profession and the public, as was the case with respect to the original publication.



Rule 41, as to marking folios, is now made expressly applicable to affidavits; note at vol. I., p. 162.

Rule 20, inserted on last revision, imposes additional restrictions on applications for time to answer, by requiring merits to be sworn to on those applications. Note change, at vol. I., pp. 178, 449. On the same revision, Rules 20 and 21, of 1852, were stricken out altogether, the general powers of the judges being sufficient for the purposes for which those Rules were made, without the necessity of any special provision on the subject. Note, under the heads of Motion to dismiss, and Postponement of Trial, at vol. I., pp. 569, 609, 672.

As to the waiver of defects in a summons or complaint, by a general appearance on the part of the defendant; note, at vol. I., p. 427; *Beck v. Stephani*, 9 How. 193; *Van Namee v. Peoble*, 9 How. 198.

*Corwin v. Freeland*, 6 How. 241, has been reversed by the Court of Appeals, 2 Seld. 560. Note, vol. I., p. 387; vol. II. pp. 105, 106. This case seems to settle the doctrine that, if a provisional order for arrest be obtained by the plaintiff, and not set aside by the defendant, the latter will afterwards be arrestable on execution, whatever the nature of the action.

In relation to the judge's discretion with reference to the security on an arrest, and the evidence on which an order for arrest should be granted; note *Courter v. McNamara*, 9 How. 255, at vol. I., pp. 217-220. Refer to same case, as regards security on an injunction, at p. 263.

As to refusal of an injunction, when plaintiff's right to it is not clear; note *Sebring v. Lent*, 9 How. 346, at vol. I., p. 253.

As to the law of domicile, note *Lee v. Stanley*, 9 How. 272, at vol. I., p. 279.

In relation to actions by receivers, refer to *Wheeler v. Wheedon*, 9 How. 293; *St. John v. Denison*, 9 How. 343; *Seymour v. Wilson*, 16 Barb. 294; and *Hayner v. Fowler*, 16 Barb. 300; at vol. I., p. 303; vol. II., p. 142.

As to the course of adverse party, on a defective verification, note *Strauss v. Parker*, 9 How. 342, at vol. I., p. 329.

Refer to same case, as regards omission to number causes of action, at vol. I., p. 328; and also to *Van Namee v. Peoble*, 9 How. 198, and, *per contra*, to *Robinson v. Judd*, 9 How. 378.

Note *Strauss v. Parker* also, at vol. I., p. 334, as to return of defective pleading.

As to an amendment on terms, refer to *Vanderbilt v. Accessory Transit Company*, 9 How. 352, at vol. I., p. 344.

As to the making a pleading more definite and certain, note same case, and also *Welles v. Webster*, 9 How. 251, at vol. I., p. 363.

As regards the fusion of law and equity effected by the Code, note *Miller v. Losee*, 9 How. 356, at vol. I., p. 306.

As regards an omission to state the title of the cause in the complaint, refer to *Van Namee v. Peoble*, 9 How. 198, at vol. I., pp. 119, 366.

With reference to the objection on the ground of separate causes of action not being separately stated, see *Van Namee v. Peoble*, 9 How. 198; *Wood v. Anthony*, 9 How. 78; *Gooding v. McAllister*, 9 How. 123; *Strauss v. Parker*, 9 How. 342; and *Robinson v. Judd*, 9 How. 378. Note, at vol. I., pp. 369, 463.

As to misjoinder of causes of action in general, see *Welles v. Webster*, 9 How. 251; *Cohwell v. The New York and Erie Railroad Company*, 9 How. 311, and *Spier v. Robinson*, 9 How. 325. Note at vol. I., pp. 370, 461.

Make further note of *Welles v. Webster*, at vol. I., p. 378, with reference to profert by an executor.

In relation to protest of a note, see *Van Vechten v. Pruyn*, 9 How. 222, and *Hunt v. Maybee*, 3 Seld. 266. Note, at vol. I., p. 395.

As to proceedings in the nature of a creditor's bill, refer to *Wheeler v. Wheldon*, 9 How. 293, at vol. I., p. 405.

As to Injunction; note, at vol. I., p. 407, *Sebring v. Lant*, 9 How. 346.

As to an action on a policy of insurance, not importing on its face any interest in the holder, refer to *Williams v. Insurance Company of North America*, 9 How. 365, at vol. I., p. 403.

As to the effect of the giving of a promissory note, note at vol. I., p. 398, *Lake v. Tysen*, 2 Seld. 461; note also, at p. 399, *Gilbert v. Danforth*, 2 Seld. 585, as to a note payable in specific articles, instead of cash; and likewise *Austin v. Burns*, 16 Barb. 643, as to the mode of suing upon an instrument containing other stipulations, in addition to a promise to pay money.

As to an action on a cheque, note *Chapman v. White*, 2 Seld. 412, at vol. I., p. 401. Refer, also, at p. 398, to *Black v. Caffee*, 3 Seld. 281, as to an action on a bill of exchange.

As to a suit against an insolvent corporation, note, at vol. I.,



# SUPPLEMENTARY NOTICE

OF

RECENT DECISIONS, AND CHANGES IN RULES.

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## INTRODUCTION.

SINCE writing the foregoing Introduction, the additional reports there alluded to have appeared, and the cases cited in those reports have been noticed, in all portions of the text not actually gone through the press at the time of their appearance. The changes in the Rules on the revision in August last, are similarly noticed in the larger portion of the second volume, and the text is given in full in the Appendix; the first was complete before their revision. The 16th volume of Barbour's Reports also appeared on the very morning on which these notes were called for by the printer. The author has, however, delayed the press, in order to insert, in the following pages, a reference to the cases reported in that volume. The constant remodelling of completed portions of the work, involved in the fulfilment of his pledge to that effect, has not been the least of that author's labors; but he has steadily kept in view the object of making his work, as far as practicable, a synopsis of all reported cases and settled points of practice, down to its actual publication.

In order to the complete attainment of this object, it remains to notice the different decisions, and the different alterations in the Rules, which it was impossible to include in the actual text. That notice will be found in the following portions of this chapter; and a short notice, in pencil or otherwise, in the margin of the different pages below referred to, of the particu-

lars below given, will enable the reader, by a simple and easy process, to direct his attention to the subjects in question, and to obtain a sufficient reference to them for all practical purposes.

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## NOTICE.

Note *Lynch v. Livingston*, at vol. I., p. 3, as affirmed by the Court of Appeals. 2 Seld. 422.

In relation to the liability of the sheriff for a false return, note *Bacon v. Cropsey*, 2 Seld. 195, at vol. I., p. 6.

Note further, revision of Rules, at vol. I., p. 25. For text of Rules, as so revised, see vol. II., p. 643. It must be borne in mind that, from No. 67 downwards, the numbers of the Rules of 1852 were changed in that revision: deduct one, therefore, from the references in the first volume, in each Rule above that number; Rule 68, of 1852, becoming, on that revision, Rule 67, of 1854, and so on, down to the concluding Rule, which now numbers 89, instead of 90.

As to suits against stockholders of an insolvent manufacturing company, see *Bogardus v. Rosendale Manufacturing Company*, 3 Seld. 147. Note at vol. I., p. 72, and likewise at p. 79, in relation to unknown defendants.

As to the rights of the wife, and husband and wife respectively, and their joinder as parties, see *Rusher v. Morris*, 9 How. 266; *Sleight v. Read*, 9 How. 278, (affirmed by general term of first district, but affirmance as yet unreported;) *Whittemore v. Sloat*, 9 How. 317; *Noyes v. Blakeman*, 2 Seld. 567; *Ellicott v. Mosier*, 3 Seld. 201, (affirming 11 Barb. 574.) Note, at vol. I., pp. 65 to 68. Note also at p. 67, affirmance of *Lewis v. Smith*, in Court of Appeals, as reported 12 L. O. 193.

As to the remedy of interpleader, note *Beck v. Stephani*, 9 How. 193, at vol. I., p. 82.

Rule 53 is now amended, by removing the restrictions formerly imposed, as regarded the appointment of a guardian *ad litem*, so far as respects the class of common law actions. Refer to alteration, at vol. I., p. 148. The Rule, as it now stands, also provides as to the course which may be pursued, on appointing a next friend for a married woman. Note this alteration at vol. I., p. 65.

As to service by mail, as applicable to notice of protest, refer to *Van Vechten v. Pruyn*, 9 How. 222, at vol. I., p. 158.

p. 379, *Bogardus v. The Rosendale Manufacturing Company*, 3 Seld. 147.

Refer, at vol. I., p. 391, to *Dain v. Wycoff*, 3 Seld. 191, as regards an action for seduction.

As to ejectment for dower, note, at Vol. I., pp. 411, 414, affirmance of *Ellicott v. Mosier*, by Court of Appeals, 3 Seld. 201.

As to separate demand of copy complaint, for different defendants, and as to right of defendant's attorney to move for a dismissal, on the expiration of twenty days from the first of those demands, refer to *Luce v. Trempert*, 9 How. 212, at vol. I., p. 429.

As to an agreement in restraint of trade, note, vol. I., p. 379, *Holbrook v. Waters*, 9 How. 335.

As to the admission of facts, by demurrer, when taken, note, at vol. I., p. 457, *Spier v. Robinson*, 9 How. 325.

In support of the doctrine that a denial and a justification may be admissible in the same pleading, in slander, note, at vol. I., p. 496, *Hollenbeck v. Clow*, 9 How. 289; but see adverse decisions, there cited. Note same case in relation to inconsistent defences, at p. 511.

Note, at vol. I., p. 507, *Cowles v. Cowles*, 9 How. 361, to the effect that a defendant, on showing that one of several plaintiffs is the sole party in interest, may avail himself of a set-off against that plaintiff.

As to the doctrine of *res judicata*, note *Kelsey v. Bradbury*, 12 L. O. 222, at vol. I., pp. 488, 674.

Note, at vol. I., pp. 488, 535, *Russell v. Harding*, 12 L. O. 216, holding that the insolvent laws of another State are not pleadable as matter of defence in this.

As to the objection of the pendency of another action, and the mode of taking that objection, refer to *Compton v. Green*, 9 How. 228, at vol. I., pp. 461, 474.

As to the defence of usury, and its inadmissibility in foreclosure, note, at vol. I., pp. 493, 501, *Sands v. Church*, 2 Seld. 347.

Note, at vol. I., p. 554, *Beck v. Stephani*, 9 How. 193, and *Spier v. Robinson*, 9 How. 325, as to supplemental complaint, and the general practice on that subject. Note latter case likewise at vol. II., p. 342, with reference to a supplemental pleading, in a suit, abated before the 1st July, 1848, and as to proceedings in such a case being governed by the old, and not by the new practice.

In *Miller v. Losee*, 9 How. 356, it is laid down, that it is competent for the plaintiff to reply to an equitable set-off pleaded by the defendant, and that the former may allege in that reply, any new matter, which would have constituted a defence to that set-off in a separate action. Note at vol. I., p. 528.

Note, at vol. I., pp. 659, 699, New Rule No. 21, expressly providing that issues of fact, to be tried by the court, may be tried at the circuit or special term.

In relation to the law of evidence, note as below; as to referring to a written memorandum, and also as to impeaching or contradicting a witness, *Huff v. Bennett*, 2 Seld. 337; in relation to the latter subject, *Newton v. Harris*, 2 Seld. 345; as to evidence of character, *Dain v. Wycoff*, 3 Seld. 191; at vol. I., p. 676. Note, also, at p. 675, *Hunt v. Maybee*, 3 Seld. 266, with reference to the protest of a note.

Note at vol. I., pp. 691, 730, reversal, by the Court of Appeals, of *Bulkeley v. Keteltas*. See 2 Seld. 384.

As to the waiver of objections not taken at the trial, note *Newton v. Harris*, 2 Seld. 345, at vol. I., pp. 668, 692.

Note at vol. I., pp. 693, 701, *Hunt v. Maybee*, 3 Seld. 266, and *Sands v. Church*, 2 Seld. 347, as to disregard of a general exception.

A stipulation that a judge's decision on an issue of fact tried before him, shall be considered as duly excepted to, will not avail as an exception, *Stephens v. Reynolds*, 2 Seld. 454, Note at vol. I., pp. 668, 701. As to whether his decision on such a trial may not be given by parol, and not in writing, note *Sands v. Church*, 2 Seld. 347, vol. I., p. 700.

Note at vol. I., p. 733, and likewise at vol. II., p. 216, *Brown v. Heacock*, 9 How. 345, holding that an appeal may be maintainable on the record alone, without a case or exceptions.

Note at vol. I., pp. 730, 742, the amendment of Rule 24; providing expressly, that exceptions are to be settled in the same manner as cases.

In relation to appeals upon special proceedings, and the costs thereon, refer to *The People v. Sturtevant*, 9 How. 304, at vol. II., pp. 207, 262.

Note at vol. II., p. 246, *Lalson v. Wallace*, 9 How. 344, as to the effect of a remittitur.

As to the reviewal of an intermediate order, in connection with the judgment of an inferior court; note *Cowles v. Cowles*, 9 How. 361, at vol. II., p. 212.

Note at vol. II., p. 214, affirmance, by Court of Appeals, 2 Seld. 443, of *McMahon v. Harrison*, there cited.

No appeal will lie to the Court of Appeals, from an interlocutory decree in partition. Refer to *Beebe v. Griffing*, 2 Seld. 465, at vol. II., p. 236.

The copy judgment roll returned to the general term, need no longer be certified by the clerk, since the last amendment of Rule 29, note change, at vol. II., p. 188.

A discharge of a judgment is not binding, if the possession of it be obtained, on conditions which are not complied with. *Crosby v. Wood*, 2 Seld. 369. Note at vol. II., p. 84.

As to the disposition of the surplus in foreclosure, and the rights of the wife, as against the judgment creditors of the husband; refer to *Sleight v. Read*, 9 How. 278, at vol. II., p. 63.

In relation to the virtual enforcement of an order, for payment of an allowance in divorce, by striking out the defendant's answer, on default on such payment; refer to *Farnham v. Farnham*, 9 How. 231, at vol. II., p. 111.

As regards the allowance of term fees; note *Sipperly v. Warner*, 9 How. 332, at vol. II., p. 281.

As to an application for an allowance, and to whom it should be made; refer to *The Saratoga and Washington Railroad Co. v. McCoy*, 9 How. 339, at vol. II., p. 287.

As to the liability of executors, and as to the costs on a reference of a claim against a testator's estate, under the Revised Statutes; note *Avery v. Smith*, 9 How. 349, and *Cruikshank v. Cruikshank*, 9 How. 350, at vol. II., p. 259.

As to double costs to public officers, and in support of the doctrine that they are not allowable; refer to *Platt v. Willson*, 9 How. 375, at vol. II., p. 256.

As to the non-appealability of an order in relation to the costs of a motion; note *Dennison v. Dennison*, 9 How. 246, at vol. II., pp. 201, 230, 307.

Note at vol. II., p. 329, *Hill v. Mohawk and Hudson Railroad Company*, 3 Seld. 152; *The Albany Northern Railroad Company v. Lansing*, 16 Barb. 68; *The Troy and Boston Railroad Company v. Northern Turnpike Company*, 16 Barb. 100; *Holbrook v. Utica and Schenectady Railroad Company*, 16 Barb. 113; *Wilson v. Rochester and Syracuse Railroad Company*, 16 Barb. 167; *Albany and West Stockbridge Railroad Co. v. Town of Canaan*, 16 Barb. 244; *The Niagara Falls, &c., Railroad Co. v. Hotchkiss*, 16 Barb.

270; *Canandaigua, &c., Railroad Co. v. Payne*, 16 Barb. 273; *Parker v. Rensselaer and Saratoga Railroad Co.*, 16 Barb. 315; *Spade v. Hudson River Railroad Co.*, 16 Barb. 383; *Hegeman v. Western Railroad Corporation*, 16 Barb. 353, with reference to the General Railroad Act. Note, also, at vol. II., p. 330, *Dexter v. Broat*, 16 Barb. 337, and *Dexter and Limerick Plank-road Company v. Allen*, 16 Barb. 15, in relation to the General Plank-road Act.

Note at vol. I., pp. 55 and 77, *Mead v. York*, 2 Seld. 449; confirming the doctrine in *Truscott v. King*, there cited.

Note at vol. I., pp. 15 and 37, decision of Court of Appeals, in *Nicholson v. Leavitt*, 2 Seld. 510, overruling the doctrine, and reversing the judgment of the Superior Court, in that case.

Note also, case of *Bowen v. Newell*, alluded to vol. I., pp. 15, 37, 397, and 401, as reported 12 L. O. 231.

Note at vol. I., p. 408, *McQuade v. Warren*, 12 L. O. 250, in relation to a suit for specific performance.

Note at vol. II., p. 339, *Stanton v. Kline*, 16 Barb. 9, and *Bunce v. Reed*, 16 Barb. 347, as regards foreclosure by advertisement.

Refer, at vol. I., p. 411, to *Sheldon v. Van Slyke*, 16 Barb. 26, as regards an action for mesne profits, by way of restitution, on the reversal of a judgment in ejectment. Note also, at same page, *McGregor v. Comstock*, 16 Barb. 427, in relation to ejectment in general.

As regards suits against parties jointly and severally liable under a promissory note, and the judgment in such cases, refer to *Parker v. Jackson*, 16 Barb. 33, at vol. I., p. 71, and vol. II., pp. 25, 26.

Note at vol. I., p. 484, *Baker v. Bailey*, 16 Barb. 54, as to the insufficiency of a mere denial *modo et formâ*, as containing a negative pregnant.

As to a complaint on a policy of insurance; note, at vol. I., p. 403, *Nellis v. De Forest*, 16 Barb. 61, and *The Utica Insurance Co. v. The American Mutual Insurance Co.*, 16 Barb. 171.

As to actions on a guaranty or instrument of that nature, note *Van Schaick v. Winn*, 16 Barb. 89; and *Cooke v. Nathan*, 16 Barb. 342; at vol. I., p. 400.

Note, at vol. I., pp. 50, 52, *Delancy v. Nagle*, 16 Barb. 97, and *Stewart v. Brown*, 16 Barb. 367; in relation to proceedings in justices' courts.

As to the power of the court to grant a reference on a motion,

appeals themselves, being governed by the old practice, and as to the practice thereon, refer to *Brockway v. Jewett*, 16 Barb. 590, at vol. II., p. 213.

Note also same case, as regards only one set of costs being allowed to attorneys who are partners, at vol. II., p. 270.

As to the making up of the judgment roll, and the effect of an omission to give notice of taxation of costs, note *Stimson v. Huggins*, 16 Barb. 658, at vol. II., pp. 6, 302.

As to the joinder of all necessary parties as plaintiffs, note *Loomis v. Brown*, 16 Barb. 325, at vol. I., pp. 69, 376.

Note, at vol. I., p. 349, *Andrews v. Bond*, 16 Barb. 633, refusing to allow an action sounding in tort to be converted into an action in contract, by amendment, after the decision of an appeal.

Note same case, at vol. I., p. 307, with reference to the distinction between actions in tort and in assumpsit, being still existent under the Code.

Note same case, also, at vol. I., p. 476, as to the admissibility of general evidence, under a general denial of the plaintiff's case.

Note, at vol. II., p. 316, *The People v. Flagg*, 16 Barb. 503, in relation to mandamus; at p. 326, *The People v. Mayer*, 16 Barb. 362, as to habeas corpus and certiorari; and, at p. 327, *The People v. Ryder*, 16 Barb. 370, as to proceedings in the nature of a *quo warranto*.

In relation to summary proceedings to recover possession of land, note, at vol. II., p. 337, *Wiggin v. Woodruff*, 16 Barb. 474, and *Burnet v. Scribner*, 16 Barb. 621.

As to the complaint in an action to abate a nuisance, note *Ellsworth v. Putnam*, 16 Barb. 565, at vol. I., p. 414, and vol. II., p. 331.

As to what will or will not constitute a sufficient levy on execution, note, at vol. II., p. 97, *Price v. Shippis*, 16 Barb. 585.

As to the law in relation to notice, and presentment of a promissory note, refer, at vol. I., p. 395, to *Wooden v. Foster*, 16 Barb. 146, and *Barker v. Cassidy*, 16 Barb. 177.

In relation to the liability on instruments of that nature, generally considered, note, at vol. I., p. 397, *Hall v. Wilson*, 16 Barb. 548, and *Andrews v. Bond*, 16 Barb. 633.





the mode of trial on that reference, and the power to cross-examine a party who has made a deposition thereon, note *Meyer v. Lent*, 16 Barb. 538, at vol. I., pp. 194, 562, 710. As to the conclusiveness of a referee's report, refer to *Wood v. Foster*, 16 Barb. 146, at vol. I., p. 715.

In relation to limitations, note, at vol. I., p. 98, *Parker v. Jackson*, 16 Barb. 33, as to actions against administrators; and, at page 94, *Barker v. Sheldon*, 16 Barb. 177, as to the statutory period running in the case of an endorser, who has paid the amount, from the time of payment by him, and not from the date on which the note on which he was liable, fell due.

An executor, whilst he remains such, is not a competent witness to sustain his testator's will; but, on renunciation, he becomes so; note *Burritt v. Silliman*, 16 Barb. 198, at vol. I., p. 653.

As to the doctrine of adverse possession, note *Hoyt v. Carter*, 16 Barb. 212; at vol. I., p. 88.

In relation to the waiver of the right to move for a new trial, on the ground of newly discovered evidence, by want of due diligence, note, at vol. I., p. 752, *Munn v. Worrall*, 16 Barb. 221. Note same case also, at vol. I., p. 78, in relation to the setting aside a decree on the ground of fraud, and the possibility of a similar waiver in such cases, although, as a general rule, the decree should not stand.

Note, at vol. I., p. 748, *Horner v. Wood*, 16 Barb. 386, as to the disregard of immaterial errors, on a motion for a new trial.

Note also, at vol. I., p. 747, *Stanton v. Wetherwax*, 16 Barb. 259, in relation to a new trial on the ground of the erroneous admission of evidence; and, at same page, *Henry v. Lowell*, 16 Barb. 268, as to the right of the judge to refuse to allow the case to be reopened by the plaintiff, after the defendant has rested. Note likewise at vol. I., pp. 691 and 747, *Hubbard v. Bonesteel*, 16 Barb. 360, as to leaving the case to the jury, where there is any evidence. Note at vol. I., pp. 72, 374, *Morehouse v. Ballou*, 16 Barb. 289, as to joinder of parties, in suit against the executors of a deceased joint debtor.

As to replevin being maintainable, against a party who has fraudulently parted with the property, before suit, note *Brockway v. Burnap*, 16 Barb. 309, at vol. I., pp. 240, 403.

As to an action on an injunction bond, and the restrictions

on the defence to such action by way of estoppel, refer to *Loomis v. Brown*, 16 Barb. 325, at vol. I., pp. 402, 485.

As to the effect of a former recovery, and the satisfaction of a justice's judgment, by payment to the justice, note *Dexter v. Broat*, 16 Barb. 337, at vol. I., pp. 487, 674, and vol. II., p. 83; note, also, at vol. I., pp. 487, 674, *Groshon v. Lyon*, 16 Barb. 461, as to the former question, and as to a proceeding on petition being pleadable as *res judicata*.

As to the sheriff's liability for an escape, note *Latham v. Westervelt*, 16 Barb. 421, at vol. I., p. 5, and vol. II. p. 113.

In relation to the admissibility of evidence; note, at vol. I., pp. 675, 676, *The Troy and Boston Railroad Company v. The Northern Turnpike Company*, 16 Barb. 100, as to opinions of witnesses; *Spade v. Hudson River Railroad Company*, 16 Barb. 383, as to hearsay evidence; and *Horner v. Wood*, 16 Barb. 386, and *Cook v. Eaton*, 16 Barb. 439, as to the inadmissibility of parol evidence to vary a written contract.

As to the taking of the wrong property under an attachment, and the sheriff's liability in respect of so doing, note *Marsh v. Backus*, 15 Barb. 483, at vol. I., pp. 5, 288. Note likewise, on same subject, *Cross v. Phelps*, 16 Barb. 502. Note *Dickerson v. Cook*, 16 Barb. 509, at vol. II., pp. 119, 342, 347, as to supplementary proceedings under the Code, being applicable to executions issued before its passage.

As to judgment in partition, and the wife's rights thereon, note *Robinson v. McGregor*, 16 Barb. 531, at vol. I., pp. 65, 412, and vol. II., p. 30. Refer also, as to the wife's rights in general, at vol. I., p. 65, to *Shumway v. Cooper*, 16 Barb. 556.

As to an injunction to stay proceedings, on a judgment fraudulently kept alive, note *Shaw v. Dwight*, 16 Barb. 536, at vol. I., p. 250; vol. II., p. 78.

As to the waiver of demurrable objections, not taken in that form, note *Loomis v. Tift*, 16 Barb. 541, at vol. I., p. 464.

As to the conversion of an intended reference into an arbitration, by the course of procedure thereon, note *Jones v. Cuyler*, 16 Barb. 576, at vol. I., p. 706, and vol. II., p. 320.

As to the examination of the endorser of a note, as assignor of a chose in action, note *Jagoe v. Alleyn*, 16 Barb. 580, at vol. I., p. 654.

As to executions on justices' judgments, refer to *Price v. Shipp*, 16 Barb. 585, at vol. II., p. 117.

As to costs on appeals from surrogates' decrees, and the

PRACTICE AND PLEADING

UNDER

THE CODE.



## BOOK I.

OF THE COURTS OF JUSTICE WITHIN THE STATE OF NEW YORK.

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### CHAPTER I.

OF JUDICIAL AND OTHER OFFICERS.

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#### § 1. *Judicial Office.*

PURSUING the plan laid down in the Introduction, and assuming that the reader has already mastered the elementary works on the science of Law, and is acquainted with the general characteristics of the tribunals established for its administration within the State, it will be unnecessary to enter into any lengthened remarks on the general nature of the judicial office, on the powers and privileges which that office confers, or on the peculiar responsibilities and disabilities of its holders. Extensive in other respects as have been the recent changes, the abstract duties and abstract responsibilities of the judicial officer, apart from the peculiar constitution of the tribunal in which from time to time it may be his province to exercise jurisdiction, remain practically unchanged; and the recent decisions on that subject present therefore few, if any, features of importance. The only case, in fact, to which it seems necessary to make any allusion, is that of *Oakley v. Aspinwall*, 3 Comst. 547, 9 L. O. 45, in which it was held by a majority of the Court of Appeals, that the disqualification of consanguinity to one of the litigant parties, is a fatal objection to the validity of any decision which a judge

so disqualified shall either pronounce or concur in pronouncing; and that no form of consent, nay more, not even the expressed wish of the parties, that the judge so disqualified should remain and exercise his functions, can avail to remove that objection, or render valid a judgment so pronounced.

## § 2. *Judicial Powers, Delegation of.*

In all its more essential attributes, the judicial office is, from its very nature, incapable of delegation. In some few respects, however, functions falling in strictness within the province of the judge, are nevertheless capable of being exercised by deputy, to a certain extent, and in certain specified cases. Those cases may be shortly classified as follows :

1st. The granting of interlocutory orders, and the exercise in general of the powers of a judge of the Supreme Court at chambers, an authority exercisable by county judges within the limits of their jurisdiction.

2. The examination into accounts, or complicated questions of fact, and the taking of testimony in relation thereto, including in certain cases the power of deciding on such questions in the place of the court, which powers are exercised by referees specially appointed for that purpose.

3. The taking of testimony by commission; in which proceeding the commissioners stand to a certain extent, and within the limits of their authority, in the place of the court.

## § 3. *Clerk of Court.*

The decision of the court or jury on the controversy at issue having been pronounced, must of necessity be duly recorded. The clerk of the court is the officer appointed for this purpose. His duties are substantially unaltered by the Code, and he still remains, as under the old practice, the authorized depository of the records of his peculiar tribunal, and the official registrar of the orders pronounced by it. He possesses also, in addition to these ordinary duties, the power, *ex officio*, of assessing the amount due on the entry of judgments for the recovery of money only, —secs. 246 and 310, and of taxing the costs of the prevailing party on the entry of judgments of whatever nature—sec. 311. In

respect of these and other services he receives various fees which are prescribed by section 312. His decisions on such assessment or taxation of costs are, however, reviewable by the court—See *Whipple v. Williams*, 4 How. 28,—and any irregularities committed by him in the performance of his ministerial duties, will be corrected on proper application, and the parties placed in the situation in which they would have stood had such irregularities not occurred. *Neele v. Berryhill*, 4 How. 16. See also *Renouil v. Harris*, 2 Sandf. 641 ; 2 C. R. 71, and other decisions below cited. The county clerk of each county is also ministerially an officer of every one of the different tribunals throughout the State, in so far as regards the docketing of their judgments in his particular county, as a necessary preliminary to their enforcement by execution against property situate within its limits. The course to be pursued in the event of any neglect on the part of these officers in the due performance of their ministerial duties, is provided for by No. 6 of the Rules of the Supreme Court.

#### § 4. *Affidavits, taking of.*

The clerk of the court has likewise, *ex officio*, the power of taking affidavits in his own peculiar tribunal. Such affidavits may also be sworn before any of the officers styled commissioners of deeds. The functions of these last parties are purely ministerial, and therefore consanguinity to any of the parties to a suit is no valid objection to the exercise of those functions in any proceeding therein. *Lynch v. Livingston*, 8 Barb. 463. They cannot, however, act in any proceeding in which they themselves are concerned, either as parties, attorneys, or counsel, or as partners of the latter. See *Gilmore v. Hempstead*, 4 How. 153. It would seem, though, that this disqualification only extends to suits actually pending, and that in other proceedings, and even on a confession of judgment without action, the verification may be made before the attorney of one of the parties. *Post v. Coleman*, 9 How. 64. In foreign countries affidavits may be taken before any of the officers authorized by the Revised Statutes to take acknowledgments of deeds, and also before any Consul or Vice Consul, or Minister resident of the United States.—Laws of 1854, c. 206, p. 475.

### § 5. *Sheriffs, &c.*

The judgments of the court, or orders of the judge, duly entered, or recorded by the clerk, are, on process duly issued, enforceable by the sheriff. For this and other purposes, (and particularly with reference to the summoning of juries, and the proceedings connected therewith,) the latter may be considered as an officer of the court. His duties in these respects, [save as regards certain ministerial acts which will be treated of in due course, in connection with the proceedings to which they relate,] and his responsibilities in relation to the performance of those duties, remain as settled by the old practice. Express provision is made by sec. 291, and also by sec. 419, in relation to his liabilities in these respects. The same remarks may be made with regard to the duties and office of the coroner, as the ministerial agent of the court for the execution of process against the sheriff himself when necessary.

In addition to his duties in relation to the enforcement of the judgments or orders of the court, the sheriff may also, at the plaintiff's option, be made the latter's official agent for service of the process by which an action is commenced, sec. 133 and 138; and, in some cases, his employment for that purpose may be highly advisable, nay, even necessary, with a view to saving the statute of limitations, sec. 99. Under these circumstances he is equally responsible, under sec. 419, for the due performance of the duties so intrusted to him.

Although the Code itself is silent on the subject, rule 6 of the Supreme Court prescribes that a party aggrieved by any neglect on the part of the sheriff or coroner as above, may serve upon him a notice to perform the act required, within ten days, or show cause why an attachment should not issue against him; the ulterior proceedings under such notice being conducted according to the old practice in similar cases.

Without entering fully into the question, a notice of some of the recently decided cases in relation to the duties and liabilities of this officer, and of his deputies, may be useful.

The law in relation to the appointment and functions of the latter will be found laid down in *Gilbert v. Ince*, 11 Barb. 91. Where the sheriff, knowing that the defendant had property to satisfy the debt in full, neglected to levy a sufficient amount



under an attachment, he was held liable in an action for the deficiency.—*Ransom v. Hulcott*, 9 How. 119.

The sheriff is not protected in taking the goods of a wrong party, even though directed to do so by the writ.—*Stimpson v. Reynolds*, 14 Barb. 506; see also *Hoyt v. Van Alstyne*, 15 Barb. 568.

The sheriff is answerable for the acts of his deputies, and is liable on his official bond if they seize the goods of a wrong party. If he have taken an indemnity, his sureties are entitled to be subrogated to it, in an action brought against him.—*The People v. Schuyler*, 4 Comst. 173. He is also liable for the mistakes and misfeasances of those deputies.—*Sheldon v. Paine*, Court of Appeals, 30th Dec. 1852; *Waterbury v. Westervelt*, Court of Appeals, 18th April, 1854.

Where however the sheriff has neglected or violated his duty, so as to be required to pay the plaintiff, he ought not, as a general rule, to be permitted to use the judgment for his own benefit, unless under peculiar circumstances and by express leave of the court.—*Carpenter v. Stillwell*, 12 Barb. 128.

With respect to the liability of the sheriff on an escape, it has been held that the subsequent death of an escaped debtor before action brought, was no bar to its enforcement, though the recapture or voluntary return of such debtor would have been so.—*Tanner v. Hallenbeck*, 4 How. 297. Nor, on such an action brought against him, can he avail himself of any defects in the original process, rendering such process voidable only, and not actually void.—*Hutchinson v. Brand*, 6 How. 73, affirmed by the Court of Appeals 31st December, 1853. On a recovery against him in such an action, he is liable for the whole judgment and costs, but not for interest on the former.

It was also held in *Brown v. Tracy*, 9 How. 93, that he is liable for an escape where a person charged in execution on final process is taken from his custody, upon a warrant of a police justice. He had a right to detain the prisoner, and was bound to do so.

Where the sheriff has become liable as bail on an arrest, by the omission of the sureties to justify, he may put in substituted bail at any time before, but not after, process against the person of the defendant. He is however only liable as other bail are, and has the same right to surrender the defendant within

twenty days after action brought, as is given to them by s. 191; and, upon obtaining lawful custody of the defendant, so that he may be retained on process, he will be discharged from his liability.—*Buckman v. Carnley*, 9 How. 180. He has also the same rights as other bail to arrest and surrender the defendant, for which purpose no process is necessary.—*Sartos v. Merceques*, 9 How. 188.

In an action against the sheriff for neglect in not levying and returning a writ, the plaintiff is "*prima facie*" entitled to recover the amount of the judgment, with interest. He may show, however, in mitigation of damages, that the whole sum could not have been collected by due diligence on his part. *Ledyard v. Jones*, 4 Sandf. 67.

*Van Rensselaer v. Chadwick*, 7 How. 297, contains an "*obiter dictum*" that the sheriff's return as to service of process is capable of being disproved. The better opinion seems however to be, that it is conclusive in all cases as regards his official acts.—*The Col. Insurance Co. v. Force*, 8 How. 353; *Learned v. Vandenberg*, 7 How. 379; *Russell v. Gray*, 11 Barb. 541.

## § 6. Other Ministerial Officers.

The authorized depositary of moneys brought into court by the authority of the different tribunals, is, in the absence of special directions upon the subject, the county treasurer of the county in which the action is triable, or, in the city of New York, the chamberlain of that city. The statutory provisions in relation to this subject will be found at 1 R. S. 369—371, and the rules of the Supreme Court on the subject, in Nos. 79 to 81 inclusive.

Although not regular officers of the court, receivers and guardians ad litem may, in reference to the purposes for which they are respectively appointed, be considered as standing ministerially, and as exercising limited powers in that capacity; though only on delegation of those powers in the first instance, and subject to the control of the court in all respects with reference to their exercise. The authorities so exercised, and the duties of these officers in relation thereto, will be considered hereafter.

### § 7. *Attorneys and Counsel.*

The above summary includes all the regular officers of a duly constituted court, through whose medium its decisions are pronounced in the first instance, and afterwards duly recorded and enforced. An important class remains however to be noticed, who, though exercising no ministerial functions, are yet so far officers of the court, in that they were originally appointed by its authority, and remain subject to its control, and also, in certain cases, must exercise their functions without remuneration, under its special direction. See 2 R. S. 444 and 445, in relation to suits *in forma pauperis*. The class alluded to is that of counsel and attorneys, by whom the proceedings in any court whatsoever are usually conducted, from their outset to their final termination.

The duties and responsibilities of these quasi officers, the privileges they enjoy, the disabilities under which they labor, and the mode in which any misconduct on their part may be provided against, or punished, remain entirely unaltered by the Code, and are governed in all respects by the old practice; to the treatises on which, and also to the different provisions on these subjects in the Revised Statutes, the reader is accordingly referred, in accordance with the plan prescribed at the outset of the work. The only points in which the law on the subject is at all affected by the recent measures are, first, in relation to the original appointment of these parties, and secondly, by the total repeal of all legislative provisions, and of the former powers of the court to control and prevent abuse in the pecuniary arrangements between them and their clients, effected by sec. 303 of the Code. See, however, this subject hereafter considered in connection with this last provision, and the case of *Barry v. Whitney*, 3 Sandf. 696; 1 C. R. (N. S.) 111, there cited.

The offices of attorney and counsel, separated in England by rigid and impassable barriers, are, in this State, not merely compatible, but universally exercised in conjunction with each other, all the former restrictions upon and prerequisites to the appointment to those offices, being at once and for ever swept away by sec. 8 of article 6 of the present constitution, which provides as follows:

“Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications

of learning and ability, is entitled to admission to practice in all the courts of the State;" the spirit of which provision has since been fully carried out in detail; first by the Judiciary Act, and ultimately by Rules 1 and 2 of the Supreme Court, by which the practice on admissions is now governed, and to which accordingly the reader is referred upon the subject. That an absolute compliance with these rules in every respect is necessary in all cases, was decided in *Re Brewer*, 3 How. 169.

In the amended Judiciary Act, however, (c. 490 of Laws of 1847,) a provision is inserted, sec. 46, which has given rise to considerable and doubtful discussion. The provision in question is as follows:

"Any person of good moral character, although not admitted as an attorney, may manage, prosecute, or defend a suit for any other person, provided he is specially authorized for that purpose by the party for whom he appears, in writing, or by personal nomination in open court."

An important question has been raised as to the constitutionality of this provision, although, even in the strictest view that can be taken, it confers no *general* license to practise on the part of the person claiming to act under it; but is, on the contrary, a mere special and limited authority, confined to the individual case for which a special nomination is made, and to that case alone: and a series of decisions have been pronounced on the subject, holding it to be unconstitutional. The first of these is *Bullard v. Van Tassel*, 3 How. 402, followed up by *Weare v. Slocum*, 1 C. R. 105; 3 How. 397, (although in that case the question as to a personal retainer does not seem to have been raised,) and lastly by *McKean v. Devries*, 3 Barb., 196; 1 C. R. 6. The latter may be looked upon as the leading case on the subject, and in it the doctrine of unconstitutionality by implication is pushed to its utmost limits, in direct opposition to the principles laid down in *Beecher v. Allen*, 5 Barb. 169, that courts of law ought not rashly to presume that the legislature has transcended its powers, but that the presumption lies the other way, in all cases where any reasonable doubt is admissible. It appears also by a note, 1 C. R. 106, that, in another district, *Sill, J.*, refused to be bound by the decision in *McKean v. Devries*, and allowed a party not an attorney, to appear for another, on his due compliance with the requisites imposed by the provision in question.

Two branches of the Supreme Court are thus in direct conflict on the subject of the above provision, and it seems a matter to be regretted that the particular question has not yet been set at comparative rest by the decision of a general term of that court.

The point as to whether parties may or may not act wisely in availing themselves of the facilities hereby granted, is entirely beside the question. Any right of whatever nature, constitutionally given by the legislature in the regular exercise of its powers, cannot constitutionally be taken away by any subordinate authority, on any forced construction, or on any considerations as to its convenience or inconvenience. The legislature, in the ordinary exercise of those powers, have passed the enactment in question, such as it is; that enactment being, moreover, one calculated rather to extend than to abridge the general liberties of the citizen: and if that enactment can by any construction be carried into effect, without a direct and positive violation of the constitution, the courts, it may well be contended, are bound to give it that effect, whatever may be their own views on the subject; and certainly the general doctrines as to constitutionality or unconstitutionality as laid down in *Beecher v. Allen*, seem, when examined, preferable to those maintained in *McKoan v. Devries*, and the other cases to the same effect; the former being, moreover, a decision of the general, and the others of the special term.

In *Roy v. Harley*, 11 L. O. 29, 1 Duer, 637, the question was brought before the Superior Court; and, although the point of constitutionality was not directly passed upon, but is on the contrary expressly avoided, the general scope of the opinion of Bosworth, J., given on consultation with the other justices, seems to infer that, if made in due form, such a nomination might be sustained by that tribunal. It was held that full and satisfactory evidence of the appointment itself, and also of the good moral character of the party named, must be adduced, and an order of the court must then be obtained and entered, and subsequently incorporated in the judgment roll; after which order, such party may proceed in the action, and his proceedings will then be regular, unless the provision of the Judiciary Act in question be unconstitutional. The above conditions precedent to the validity of such an appointment, not having been complied with in that particular case, the proceedings of the parties there in question were declared irregular and set aside.

## CHAPTER II.

OF THE DIFFERENT COURTS OF JUSTICE WITHIN THE STATE  
OF NEW YORK.§ 8. *Courts, List of.*

IN section 9 of the Code, a list is given of the different tribunals within the State, and, in the following section, their then present jurisdiction is saved in all cases, except as otherwise prescribed by that Act.

The list in question is as follows:

1. The court for the trial of impeachments.
2. The Court of Appeals.
3. The Supreme Court.
4. The Circuit Courts.
5. The Courts of Oyer and Terminer.
6. The County Courts.
7. The Courts of Sessions.
8. The Courts of Special Sessions.
9. The Surrogates' Courts.
10. The courts of justices of the peace.
11. The Superior Court of the city of New York.
12. The Court of Common Pleas for the city and county of New York.
13. The Mayors' Courts of cities.
14. The Recorders' Courts of cities.
15. The Marine Court of the city of New-York.
16. The Justices' Courts in the city of New-York.
17. The Justices' Courts of cities.
18. The Police Courts.

It will of course be observed, that, valuable as an official list of the different courts of justice unquestionably is, still, as regards the operation of the Code itself, that list is in part irrele-

vant, many of the tribunals enumerated being neither directly nor indirectly affected by its provisions. Those provisions relate simply and solely to civil, and trench in no manner upon the limits of either criminal or police jurisdiction; and therefore the proceedings in Nos. 1, 5, 7, 8, and 18, which courts fall exclusively within one or the other of the latter categories, are entirely without their scope.

The Surrogate's courts, (No. 9,) being tribunals exercising special statutory jurisdiction, are likewise in no manner affected by the recent changes. Proceedings in them, and the review of those proceedings, are, on the contrary, exclusively and entirely governed by the provisions of the Revised Statutes.

The marine and justices' courts also, Nos. 15, 16, and 17, though their jurisdiction is defined by the Code, and the general course of practice in them laid down by title VI. of part I. of that measure, are likewise mainly governed by other statutory provisions. The course of proceedings in those courts is essentially different in all its main features from that pursued in those of higher jurisdiction, and remains substantially the same as heretofore. No attempt has accordingly been made by the author to enter into the full details of their practice, his observations on the subject being confined to a mere reference to the enactments of the Code as regards the tribunals in question, and a citation of the different reported cases which bear upon the appellate jurisdiction of the higher courts in relation to the review of their decisions. To have attempted more than this, would have involved the composition of a separate and independent treatise, upon a subject unconnected with the general operation of the Code, and one moreover already separately dealt with by others.

### § 9. *Federal Courts, Jurisdiction of.*

Before proceeding to the detailed consideration of the jurisdiction and functions of the different tribunals comprised in the foregoing list, another subject seems to require at least a cursory notice, though in strictness of a collateral nature; that subject being the exclusive or concurrent jurisdiction of the federal courts in certain cases.

To enter into any lengthened discussion upon the extent and exercise of that jurisdiction, would be of course beyond the limits

of the present work; while, on the other hand, to omit all reference to it might lead to serious inconvenience. The better course appears to be to give a slight sketch of its extent and boundaries, and then to leave the matter open for the further researches of the student, merely indicating the sources through which those researches may best be prosecuted.

He cannot take a better guide for this purpose than the first volume of the invaluable commentaries of Chancellor Kent, part II., consulting, in particular, Lectures XIV. to XIX. inclusive, with the different statutory provisions and authorities there cited. The summary contained in the first volume of Conkling's treatise will also be found succinct and trustworthy. An attentive perusal of these two works will be sufficient to give a good general idea upon the subject, and to suggest the further course of reading by which its details may be fully mastered.

Without pretending, therefore, to give more than a mere sketch of the jurisdiction in question, that jurisdiction may be defined as threefold—

1. The original and exclusive,
2. The concurrent,
3. The appellate authority possessed by the courts referred to, within the limits of the State sovereignties, and which authorities are exercisable, the two former by the District and Circuit, and the latter by the Supreme Court of the United States.

The original and exclusive jurisdiction of the federal tribunals extends to controversies of the following nature:

1. To cases between two States.
2. To cases where a foreign ambassador, minister, or consul, or the domestics of the two former, are parties defendants.
3. To cases in which a State is defendant, save only as regards controversies between a State and its own citizens.
4. To cases arising under the patent or copyright laws, or the revenue laws of the United States.
5. To cases of admiralty or maritime jurisdiction; and,
6. To criminal cases arising within the limits of that jurisdiction, or cognizable under the authority of the United States.

In *Dudley v. Mughew*, 3 Comst. 9, it was held by the Court of Appeals in this State that, in cases falling under class 4, the State courts cannot exercise jurisdiction even by consent. The personal privileges under class 2 seem, however, capable of being waived by continued non-assertion, though the right



of asserting them can never be barred, but may, on the contrary, be exercised at any stage of any proceeding in the local tribunals. See this subject more fully considered hereafter, under the head of parties defendants in actions in the courts of this State.

The concurrent jurisdiction of the federal tribunals may be shortly stated as comprising,

1. All cases in law or equity, arising under the Constitution, laws and treaties of the United States; or where an alien sues for tort in violation of the law of nations.

2. Cases wherein foreign ambassadors, consuls, &c., are plaintiffs.

3. Cases wherein the United States are plaintiffs.

4. Controversies in which a State is plaintiff, and individuals are defendants.

5. Controversies between a State, defendant, and its own citizens.

6. Controversies between citizens of different States, or between citizens of the same State, claiming lands under grants of different States.

7. Controversies between a State or the citizens thereof, and a foreign state.

8. Controversies between citizens and aliens.

The jurisdiction under classes 3, 6, and 8, is, however, limited to cases where the value of the thing in controversy exceeds five hundred dollars; the amount of the claim itself, and not of the recovery, being the criterion of value. Where exercisable, the jurisdiction in cases of this description is so far paramount, that they are removable from the State court to the federal tribunal by authority of the latter, by means of a proceeding analogous to certiorari. See Kent Com. vol. 1, p. 303. See also *Field v. Blair*, 1 C. R. (N. S.) 292, 361; *Suydam v. Ewing*, Id. 294.

In cases falling under Nos. 6 and 8 of the last-mentioned classes, it is essential that the facts conferring jurisdiction should appear on the face of the record, or the federal tribunal cannot take cognizance of them at all. In particular, where one party is an alien, the citizenship of the other must be affirmatively shown, the jurisdiction of the federal courts not extending to suits between one alien and another. See 1 Kent, 344 and 345, and the cases there cited.

The appellate jurisdiction of the federal tribunals extends, in

the last place, to all cases in which any decision shall have been pronounced by the highest court of any State, repugnant to the Constitution, treaties, or statutes of the United States, or drawing in question any commission issued or authority conferred by the general government. The extent of this jurisdiction will be found defined at 1 Kent Com. p. 299 and 300; and the whole of the lecture, No. XIV., in which that passage is contained, and the following one, No. XV., in which the subject is more fully entered upon, and various authorities are cited, demands and should receive the student's most careful attention.

On questions of commercial law, the decisions of the Supreme Court of the United States ought to be regarded as paramount and controlling. *Stoddard v. The Long Island Railroad Company*, 5 Sandf. 180.

In relation to the possible conflict of jurisdiction in matters falling equally within the cognizance of the federal and State tribunals, vide *The People v. The Sheriff of Westchester County*, 10 L. O. 298; and likewise in reference to the issue of warrants by an United States Commissioner, *In Re Kaine*, 10 L. O. 257; and *In Re Eickhoff*, 11 L. O. 310. See also, as to the light in which the federal jurisdiction is generally regarded in the State courts, *The Chemung County Bank v. Judson*; *Court of Appeals*, 12th April, 1853.

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## CHAPTER III.

### OF THE COURT OF APPEALS.

#### § 10. *Jurisdiction and Powers of.*

PROCEEDING then upon the consideration of the jurisdiction and office of each of the different tribunals whose practice is affected by the Code of Procedure; the first in dignity and importance is the Court of Appeals, the tribunal of last resort, except in those few cases arising on points of constitutional law, in which, as before noticed, the appellate jurisdiction of the Supreme Court of the United States may be invoked.

Such being the constitution and powers of the Court of Ap-

peals, it need hardly be remarked, that its reported decisions are of the highest authority; and that a principle of law once established by one of those decisions, is, as a general rule, conclusive upon the inferior jurisdictions, until either reversed or modified by the same tribunal, or by the paramount authority of the federal court of appeal, in cases where that jurisdiction may be invoked—see *Palmer v. Lawrence*, 1 Seld. 389; and this is the case, even where the judgment so pronounced appears to have been arrived at, by a process which the court below may consider in itself unsatisfactory. See *Oakley v. Aspinwall*, 1 Duer; 10 L. O. 79, by the majority of the court. See however the dissenting opinion of Bosworth, J., in which the contrary doctrine is advocated in great detail and with great force. The above proposition is, as a general rule, incontestable. It is not, however, without exceptions in a modified degree. Thus in *Wright v. Douglass*, 10 Barb. 97, where, on the new trial of the cause, new evidence was introduced, which removed the principal ground of the reversal of their former adjudication by the Court of Appeals, the Supreme Court regarded itself at liberty, on such new evidence, to declare the same judgment it had formerly rendered. In *Nicholson v. Leavitt*, 4 Sandf. 253, 9 L. O. 105, the general term of the Superior Court in like manner refused to be bound by the opinion delivered by the presiding judge of the Court of Appeals in *Barney v. Griffin*, 2 Comst. 365, on the ground that it did not appear that the other judges of that court concurred in the views there laid down; and, in a recent case of *Bowen v. Newell*, as yet unreported, the same tribunal has reasserted a similar independence, and even re-affirmed its previous conclusions on a point of commercial law, in opposition to the view taken by the Court of Appeals, on the ground that the authorities in support of that view, though apparently passed upon, had not in fact been distinctly brought to the notice of the latter tribunal. In *Whitney v. Knows*, however, 11 Barb. 198, a less bold view was taken by the special term of the Supreme Court, and the decision in *Griffin v. Barney* was looked upon as a controlling authority.

The court in question occupies the place and exercises the powers of the Court of Errors under the old system. The provisions on its original creation will be found in article 6 of the constitution of 1846, and also in article 2 of the Judiciary Act, laws of 1847, c. 280. It consists of eight judges—four elected by the electors of the State, one at the expiration of

every two successive years, and four selected from the justices of the Supreme Court; the judge of the former class having the shortest time to serve, being, from time to time, the chief judge *ex officio*. Its sittings were at first intended to be migratory, and were held in turn in each of the different judicial districts; but, by section 13 of the Code of 1851, they are now permanently fixed for the future at Albany, where four terms are to be held every year, at the periods therein specified, with a power to appoint additional terms when required by the public interest.

The following are the provisions of the Code, as last amended, on the subject of the important jurisdiction exercisable by this high tribunal:

§ 11. The Court of Appeals shall have exclusive jurisdiction to review, upon appeal, every actual determination hereafter made at a general term, by the Supreme Court, or by the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, in the following cases, and no other:

1. In a judgment in an action commenced therein, or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken.

3. In a final order affecting a substantial right, made in a special proceeding, or upon a summary application, in an action, after judgment.

But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the Marine Court of the city of New York, or in an assistant-justices' court of that city, or in a justice's court of any of the cities of this State.

§ 12. The Court of Appeals may reverse, affirm, or modify the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law.

On reference to the corresponding section in the measure of 1849, it will be seen that the recent amendments materially extend the powers previously exercised by this court, the whole of subdivision 2 being entirely new.

In the Code of 1851, a fourth subdivision was added, by which an appeal lay to this court in an order granting a new trial.

The latter provision was probably inserted in consequence of the decisions in *Duane v. The Northern Railroad Company*, 3 Comst. 545, 4 How. 364, 3 C. R. 72; *Lansing v. Russell*, 2 Comst. 563, 4 How. 213; and *Tilley v. Phillips*, 1 Comst. 610, 3 How. 364, 1 C. R. 111: in all of which it was held that orders of this nature were not proper subjects for the interference of the appellate tribunal; both because they could not be held to come within the description of "a final determination of the rights of the parties in the action," the definition of a judgment in section 245, and also inasmuch as they were in their nature matters addressed to the discretion of the court below, with the exercise of which discretion the higher tribunals have hitherto, as a general rule, always refused to interfere. On the recent amendment these views have again prevailed, the authority of the above cases is reestablished, and the jurisdiction of this court is restored to its former consistency, by the exclusion of all discussions on questions of fact, except only as subsidiary to questions of law. See however this subject further considered under the head of Appeals, and the recent measure, Laws of 1854, c. 317, there cited.

It will be observed that, by this amendment, the Municipal Court of Brooklyn, ranked with justices' courts in the Code of 1849, is no longer to be looked upon as a court of inferior jurisdiction, but as standing, for the future, in regard to the review of its decisions, on the same level as other city and county courts.

The amendment effected in section 14, by which, in the event of five judges not concurring in the judgment on any case submitted to the court, that case is, in every instance, to be reheard, and that, twice in the event of a second disagreement, before judgment of affirmance is given in consequence of the members of the court being equally divided, is an important change from the Code of 1849, under which, on such an event occurring, the judgment of the court below was affirmed, as of course, unless a rehearing was specially ordered. This provision has since been acted upon, and the judgment of the court below affirmed, after an equal division on three successive arguments, in *Moss v. Averill*, Court of Appeals, 13 July, 1853. Of course an affirm-

ance of this nature only settles the point at issue as regards that particular case, and leaves it wholly open for renewed discussion as bearing upon the rights of other parties.

The question raised and decided in *Oakley v. Aspinwall*, 3 Comst. 547, 9 L. O. 45, as to the effect of a judge taking part in the proceedings, when under disqualification on the ground of relationship, will be borne in mind. A serious difficulty was raised in the same case, as to whether this court could be held at all by a less number than by the whole of the eight judges. The proposition that it could be so held was, however, decided in the affirmative by a majority of six; which majority also held that one, consisting of four judges out of seven, was competent to make an order upon motion, but declined to give any opinion upon the further question as to whether such a majority were competent to pronounce a judgment. It seems clear upon the face of the measure that a majority of four only would not possess adequate jurisdiction in this last respect, inasmuch as, by the express provisions of sec. 14, a concurrence of five judges is necessary for that purpose.

When judgment of affirmance is pronounced in open court, without any public expression of dissent on the part of any of its members, it would seem that it is not competent for the parties to go behind that judgment, and to apply for a rehearing, on any allegation that, in their consultations out of court, the judges were equally divided in opinion. The public act of the court, in ordering such affirmance, is conclusive, and cannot be gone behind or impeached on any private grounds. *Mason v. Jones*, 3 Comst. 375; 5 How. 118; 3 C. R. 164. Nor can any allegations of that nature be taken into consideration by the inferior tribunal whose decision has been reviewed, when the question comes on afresh under the remittitur. *Oakley v. Aspinwall*, 10 L. O. 79; 1 Duer, 1.

Where two or more points are discussed in the opinions delivered, and the determination of either in the manner there indicated would authorize the judgment pronounced, the judges concurring in the judgment must be regarded as concurring in those opinions upon the points discussed, unless some dissent is expressed, or the circumstances necessarily lead to a different conclusion. *James v. Patten*, 2 Seld. 9.

The affirmance of a judgment by default, and not upon a hearing on the merits, decides nothing as regards future adju-

dications under the same circumstances. *Watson v. Husson*, 1 Duer, 242.

See these subjects further considered in a subsequent portion of the work, under the head of Appeals to the Court in question.

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## CHAPTER IV.

### OF THE SUPREME COURT.

#### § 11. *Supreme Court, Power of.*

THE next tribunal which presents itself for consideration is the Supreme Court, a court whose powers are more extensive and more widely diffused than those of any other within the State, and embrace every species of cause, and every variety of jurisdiction; with authority also to remove cases pending in tribunals of inferior jurisdiction within its own cognizance, by certiorari. Its common law authority, analogous to that possessed by the Court of King's Bench in England, has been exercised from time immemorial, or rather, to speak more closely, from the original establishment of the English common law in this country. (See on this subject *Kanouse v. Martin*, 3 Sandf. 657, per Duer, J.) Its equitable jurisdiction is of more recent origin, being first indicated by the Constitution of 1846, art. 6, sec. 3, and afterwards expressly conferred by the Judiciary Act, laws of 1847, c. 280; and in particular by section 16 of that measure. It is in effect coëxtensive with and in substitution for that of the former Courts of Chancery thereby abolished. *Mason v. Jones*, 1 C. R. (N. S.) 335; *Conro v. Port Henry Iron Company*, 12 Barb. 27; *Lovett v. German Reformed Church*, 12 Barb. 67; *Bailey v. Ryder*, Court of Appeals, 30th December, 1852; *Suydam v. Holden*, Court of Appeals, 7th October, 1853; *People v. Porter*, 1 Duer, 709; 11 L. O. 228, (as to the custody of infants,) and numerous other cases. See also generally as to the jurisdiction of this tribunal, as reorganized under the measure last referred to, *Spicer v. Norton*, 13 Barb. 542. The jurisdiction of this, and of all other tribunals of general powers,

is always to be presumed till the contrary appears. *Wright v. Douglass*, 10 Barb. 97.

Besides their authority in civil cases, the justices of this court exercise criminal jurisdiction in the Courts of Oyer and Terminer, as defined by art. 5 of the measure last referred to. See also the recent act on this subject, Laws of 1854, c. 73, p. 151.

The mode of election, the classification, and the delegation of four of the judges of this court, to sit from time to time in the Court of Appeals, their distribution in districts throughout the State, and the provisions as to the presiding judge from time to time in each of those districts, remain as they were previously settled by the Revised Statutes and by the Judiciary Act. The Code effects no alteration whatever in these respects.

## § 12. *General and Special Terms.*

The distinction between the general and special terms of this and the other tribunals of higher jurisdiction, remains also untouched by the recent measures of amendment; though, in some few respects, the matters falling within the peculiar attributes of each of those branches of the court have been made the subject of mutation. The special term, or the Circuit Court, in which a single judge presides, remains, as before, that branch of the aggregate tribunal to which belongs the consideration in the first instance of every question brought before it, with the few exceptions about to be noticed; the Circuit Court taking peculiar cognizance of those cases in which the trial takes place by jury, and the special term of those which are triable by the court. The functions of the general term are, on the contrary, for the most part, strictly appellate; and embrace the revision of all decisions of the single judge on questions of law, to the exclusion, under ordinary circumstances, of questions of fact; and likewise the review of the judgments of subordinate courts. In certain cases, however, and in particular on appeals from orders involving the granting or refusing of a new trial, questions of fact are entertainable by this branch of the court. The general term possesses also a special jurisdiction in reference to the admission of attorneys and counsel, and to the control of the conduct of those officers when admitted; and any question



submitted for the opinion of the court, under the peculiar provisions of sec. 372 of the Code, is also originally cognizable by it. The concurrence of a majority of the judges holding a general term is, by sec. 19 of the Code, made indispensable to the validity of its decisions, and, in event of their non-concurrence, the case is on all occasions to be reheard. It will be seen that, by sec. 24 of the Code, the fullest powers of adjournment are given with reference to the terms of the Court, both general and special, including the Circuit Court and Courts of Oyer and Terminer. See as to the powers of judges specially appointed to hold a general term, and as to the presiding justice, *The People v. Hicks*, 15 Barb. 153.

### § 13. *Chamber Business—Powers of County Judges.*

Besides the hearing of causes and appeals, and of those more important interlocutory proceedings in each, which involve points vital to the decision of the controversy between the parties; occasions on which it becomes necessary to obtain the direction or authority of the court, on matters of minor importance, are, during the progress of a suit, of almost daily occurrence. To provide for these matters, and to prevent the general calendars of the court from being overburthened by their constant recurrence, a subordinate, but most important jurisdiction is exercised by the individual judges of each of the higher tribunals, at their chambers, or otherwise out of court. To enter into details on the different subjects embraced within these attributes, would at present be premature; the only remark necessary at this juncture is, that, to a certain extent, and for certain purposes, that branch of jurisdiction is, as before noticed, capable of delegation, and may be exercised, *ex officio*, by the different county judges throughout the State, each within the limits of his peculiar jurisdiction, but within those limits only. See Code, sec. 401, 402, 403 and 405. The powers so exercised are substantially the same as those possessed under the old practice by the judges in question, and also by the officers styled "Supreme Court commissioners," and are conferred by the Revised Statutes, in connection with sec. 29 of the Judiciary Act. See also *Graham's Practice*, chap. ii., sec. 2. The jurisdiction of these officers being, however, limited, the presumption, as in all similar cases, will always be against, rather

than in favor of their power to exercise it, wherever that power is open to reasonable doubt on any point, either technical or affecting the merits. See *The People ex rel. Williams v. Hulbert*, 5 How. 446; 1 C. R. (N. S.) 75; 9 L. O. 245. Although, however, nothing can be presumed in favor of the jurisdiction of such officers in these matters, nothing will, on the contrary, be presumed against it, in the absence of actual proof. *Barnes v. Harris*, 4 Comst. 374.

It is clear from the terms of the Code that the county judge has no power to act at all without his county; and, in *Eddy v. Howlett*, 2 C. R. 76, it was held that the expression "his county" means, as regards the granting of orders, not the county within which the judge himself resides, but the county within which the action is triable. See also *Chubbuck v. Morrison*, 6 How. 367. A contrary view is however taken in the case of *Peebles v. Rogers*, 5 How. 208, 3 C. R. 213, where an order, extending the time to answer, granted in the county of the defendant's residence by the county judge of that county, the venue having been fixed in that of the plaintiff, was nevertheless sustained as valid under the general powers of the officer in question under the old practice, as saved by sec. 403.

The general powers of county judges in this respect, enlarged in some degree by the Code, (particularly in reference to the granting of injunctions, and to the proceedings supplementary to execution,) remain, where such has not been the case, substantially as they were before, under the then "existing practice," and are neither affected nor enlarged by that measure. *Merritt v. Slocum*, 1 C. R. 68; 3 How. 309. It was accordingly held in that case that the powers of a county judge did not extend to the hearing and deciding of motions, as such, in actions pending in the Supreme Court, but merely to the granting of orders obtainable as of course and without notice. A general stay of proceedings until after the hearing of a motion, granted by an officer of this description, without notice to the opposite party, was also set aside in *Schenck v. McKie*, 4 How. 246, 3 C. R. 24, as void for want of jurisdiction. See generally as to the power of this officer, *Conroy v. Hitchins*, 9 Barb. 378; *Otis v. Spencer*, 8 How. 171; *Sale v. Lawson*, 4 Sandf. 718, the details of which cases will be considered hereafter.

In the *Bank of Lansburgh v. McKie*, 7 How. 360, the fact that the county judge was related to the president of the plaintiffs

bank, and was a stockholder therein, was held not to be such a disqualification as to prevent him from acting ministerially in granting an attachment. In *Griffin v. Griffith*, 6 How. 428, it was considered by Harris, J., that the act of the Legislature, Laws of 1847, p. 642, conferring upon the Recorder of Troy the powers of a county judge in that city, was unconstitutional, and all his acts under those powers void.

#### § 14. *Powers of Judges out of Court.*

It will be observed in reference to sec. 401, that, in the first district, the powers of judges at chambers or out of court are greatly extended, and are in fact sufficiently large to include the granting of interlocutory orders of every description, whether upon or without notice, with the single exception of new trials upon the merits. The powers of the judges out of court do not, however, extend to the granting of judgment under any circumstances, except in the single instance of an application under sec. 247. In all other cases the motion must be made to the court sitting as such, and cannot be otherwise entertained. *Aymar v. Chase*, 1 C. R. (N. S.) 330; 12 Barb. 301.

Although the exercise of the office of judge on the part of inferior officers, by delegation, is confined within strict local limits, the powers of the judges themselves are unrestricted. Constitution, art. 6, sec. 6. Any judge of the Supreme Court is, therefore, competent to act in the place of any other, in the event of his inability to perform the peculiar duties assigned to him, (sec. 26;) and every judge moreover possesses the inherent power to make orders of course in any suit whatever, pending in any part of the State, irrespective of the district in which he for the time being exercises his functions; and orders so made by him are equally binding on all parties, as they would have been if made by a judge of that particular district. By sec. 401 a restriction is, however, imposed upon these powers, as regards the making of orders upon notice, which can only be applied for in the district within which the action is triable, or, where the county fixed upon for the trial is a border county, then in some county in the next district, immediately adjoining thereto, the first district excepted, in which, since the last amendment of the Code, motions cannot be made in actions triable

elsewhere. Motions in actions triable in that district must on the contrary be made therein, and cannot be heard in any adjoining county; and any proceeding commenced before one of its judges may, under the especial provisions of section 27, be continued before another with the same effect.

### § 15. *Courts, Arrangements as to.*

Although the general jurisdiction of the judges and officers of the Supreme Court remains unaltered by the Code, the previous arrangements as to the courts to be held by them are repealed, and fresh provisions substituted by title III. of part I. of that measure. By section 18 it is prescribed that at least four general terms, and more if necessary, shall be held annually in each judicial district, at such times and places as a majority of the judges of such district shall appoint; and, by section 20, it is made imperative that at least two Circuit Courts and Courts of Oyer and Terminer, and one special term, shall be held yearly in every county throughout the State, (Fulton and Hamilton being considered as only one county for such purpose,) with similar powers to the judges to appoint additional terms for such purposes. The times and places for holding such terms were originally fixed by the governor, and subsequently by the judges, and are for the future to be from time to time made the subject of special appointment by the latter; such appointment to be made by them at least one month before the expiration of every second year, and to be for the two years commencing on the first of January then next following. The appointment of those terms for the two years commencing on the first of January, 1854, will be found at the end of the volume.

Whenever the justices of any one particular district are under personal disqualification in respect of any cause pending therein, the court, under the powers of c. 15 of the Laws of 1850, possesses the power of removing that cause into any other adjoining district.

In addition to the above regular terms and circuits, the Governor of the State possesses also, under s. 23, the power of making additional appointments for such purpose, the same to be published in the State paper, as prescribed by sec. 25. By c. 1 of Laws of 1850, and sec. 459 of the Code, as last amended, his

powers in this respect are greatly enlarged, and he is enabled to provide for the case of a term being in danger of failing, and also for that of any one branch of the court being overburdened with business; those powers in the last instance extending to the assignment of other judges for the purpose of disposing of the arrears.

By c. 374 of the Laws of 1852, power is given to the chief judge of the Court of Appeals, on the application of the presiding judge of the first district, to appoint additional sittings to be held therein, and to assign some justice of the Supreme Court to hold such sittings, whose duty it shall be to do so. The same measure also provides for the appointment of an additional judge for the same district, which provision has since been acted upon at the last general election.

### § 16. *Appeals, &c.*

As before stated, the appeal from the decisions of the general term of this court, lies to the Court of Appeals in all cases, with the single exception of causes originally commenced in a justices' or other court of lowest jurisdiction, in which this court is the ultimate tribunal. The decisions of the Surrogate's Courts, and also of all those subsequently enumerated in this portion of the work, with the exception of those of the Superior Court and Court of Common Pleas of the city of New York, are likewise reviewable by it in its appellate capacity; the appeal lying in the first instance from the decisions of the surrogate, and also from those of the county and municipal courts; and in the second, after a previous review by the former of the two last tribunals, from the justices' and other courts of lowest jurisdiction.

### § 17. *Rules of.*

The practice of this court, and of the New York and county courts, is regulated by general rules made by the judges under the provisions of sec. 470 of the Code, and which are henceforth to be revised every two years, under the last amendment of that section. The first of these revisions took place in August, 1852, and the rules as then settled are now in force. They are binding not merely upon the Supreme Court, but also upon all

other tribunals of analogous jurisdiction, and, as such, will form the subjects of continual reference throughout the succeeding pages. It will be necessary to bear in mind that, on the last revision, the numbers of those rules were, for the most part, slightly changed. Attention to this circumstance will prevent much of the embarrassment that might otherwise arise in relation to the citations of the same provisions, as they stood previous to that revision, in the decided cases prior to August, 1852.

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## CHAPTER V.

### OF THE COUNTY COURTS.

#### § 18. *Jurisdiction and Power of.*

IN strictness these courts are of inferior authority and jurisdiction to those mentioned in the next division. The definition of that jurisdiction is, however, to a certain extent, a definition of that of the New York tribunals also; and the operation of county courts is of course of far wider scope, extending, as it now extends, throughout the whole of the State. It has, on the above grounds, been thought better to follow the order of arrangement adopted in the Code itself, and to consider the peculiarities and powers of these courts in the first instance, before treating of those of the metropolitan district.

The jurisdiction of these courts is of a special and statutory nature, and is thus expressly defined by sec. 30 of the Code as last amended:

§ 30. The County Court has jurisdiction in the following special cases, but has no original civil jurisdiction except in such cases:

1. Civil actions, in which the relief demanded is the recovery of a sum of money not exceeding five hundred dollars, or the recovery of the possession of personal property not exceeding in value five hundred dollars, and in which all the defendants are residents of the county in which the action is brought, at the time of its commencement: subject to the right of the Supreme Court, upon special motion for good cause shown, to remove any such action to the Supreme Court before trial.

2. The exclusive power to review, in the first instance, a judgment rendered in a civil action by a justice's court in the county, or by a justices' court in cities, and to affirm, reverse, or modify such judgment.

3. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises situated within the county, and the collection of any deficiency on the mortgage remaining unpaid, after the sale of the mortgaged premises.

4. The partition of real property situated within the county.

5. The admeasurement of dower in land situated within the county.

6. The sale, mortgage, or other disposition of the real property situated within the county, of an infant or person of unsound mind.

7. To compel the specific performance, by an infant heir, or other person, of a contract made by a party who shall have died before the performance thereof.

8. The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county.

9. The mortgage or sale of the real property situated within the county, of a religious corporation, and the disposition of the proceeds thereof.

10. To exercise the power and authority heretofore vested in such Courts of Common Pleas, over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties.

11. To exercise all the powers and jurisdiction conferred by statute upon the late Courts of Common Pleas of the county, or the judges or any judge thereof, respecting ferries, fisheries, turnpike-roads, wrecks, physicians, habitual drunkards, imprisoned, insolvent, absent, concealed or non-resident debtors, jail-liberties, the removal of occupants from State lands, the laying out of railroads through Indian lands, and upon appeal from the determination of commissioners of highways, and all other powers and jurisdiction conferred by statute, which has not been repealed, on the late Court of Common Pleas of the county, or on the County Court, since the late Courts of Common Pleas were abolished, except in the trial and determination of civil actions; and to prescribe the manner of exercising such jurisdiction, when the provisions of any statute are inconsistent with the organization of the County Court.

12. To remit fines and forfeited recognizances, in the same cases, and like manner as such power was given by law to Courts of Common Pleas. But the first subdivision of this section shall not apply to the County Court of the counties of Kings and Erie.

13. To grant new trials, or affirm, modify, or reverse judgments in actions tried in such court, upon exceptions or case made, subject to an

appeal to the Supreme Court. But any action or proceeding pending in the County Court, in which the county judge is for any cause incapable of acting, may be transferred by the County Court to the Supreme Court, and thereupon the papers therein, on file in the County Court, shall be transmitted to the Supreme Court in the same district, which shall thenceforth have jurisdiction of such action or proceeding.

In the Code of 1851, the counties of Albany and Monroe were likewise included in the exception made by subdivision 12. The powers of transfer to the Supreme Court of causes in which the county judge is from any reason incapable of acting, are likewise new, having been inserted on the last amendment. An analogous power was, however, contained in the Judiciary Act, sec. 31. In *Sheldon v. Albro*, 8 How. 305, it was held that an appeal transferred to the Supreme Court under that provision, was to be heard in the first instance at special, and not at general term.

It will be seen from the above summary, that, though limited in terms, the original jurisdiction of these tribunals is wide in its scope, and extends over a number of most important matters. The extent of that jurisdiction has, however, been somewhat doubted. In *Griswold v. Sheldon*, 4 Comst. 581, 1 C. R. (N. S.) 261, an opinion was expressed by *Bronson*, C. J., to the effect, that the statutory provisions giving common law jurisdiction to these courts, are unconstitutional and void. The question was not, however, actually decided in that case, and was expressly stated as remaining open for consideration, should it be ever brought before the court. In *Beecher v. Allen*, on the contrary, 5 Barb. 169, it was expressly decided, that the Legislature had not exceeded its powers in conferring the jurisdiction in question, and that the provisions for that purpose were not unconstitutional. The constitutionality of the statutory provisions conferring civil jurisdiction on these courts was also generally maintained in *Frees v. Ford*, 2 Seld. 176, 1 C. R. (N. S.) 413. Their general jurisdiction is also admitted without question, and their general rights as courts of record to grant a trial by jury maintained in *Dayharsh v. Enos*, 1 Seld. 531. In *McAllister v. Albion Plank Road Company*, 11 Barb. 610, it was held, that notwithstanding the general repealing clause in sec. 29, of all statutes defining the jurisdiction of these courts in conflict with the Code, that jurisdiction still subsisted in regard to special statu-



tory remedies. See also *Mosier v. Hilton*, 15 Barb. 657; and this view is carried out by subdivision 11 of sec. 30, as it now stands.

The jurisdiction of these courts being of a limited nature, every fact necessary to confer it must be clearly shown in all cases. See *The People ex rel. Williams v. Hulbert*, 5 How. 446; 9 L. O. 245, 1 C. R. (N. S.) 75. Nothing can be presumed in favor of such jurisdiction without actual proof, though, on the contrary, nothing will be presumed against it, unless actually shown. *Burnes v. Harris*, 4 Comst. 374.

It must be borne in mind that, with the exception of their appellate powers, and some few items of the peculiar statutory authority formerly vested in the Courts of Common Pleas, and now attributed to these tribunals, the Supreme Court exercises an equal, or rather a paramount jurisdiction over the same matters; and, in the event of any conflict with that jurisdiction, possesses the power in most instances of removing the controversy within its own cognizance, by means of certiorari, prohibition, or special order of removal, as prescribed in subdivision 1 of the section last cited.

It may be a convenience to the reader simply to refer to the provisions of the Revised Statutes, in reference to which the special powers of these courts, as above enumerated, are severally exercisable, though of course without entering into any discussion on those subjects.

The statutory provisions respecting foreclosure will be found at 2 R. S. p. 191 to 194, in connection with the jurisdiction of the Court of Chancery as then exercisable.

The statute law on the subject of partition is contained in title III., chap. V., of part III. of those statutes, 2 R. S. 316 to 333.

That as to the admeasurement of dower will be found in title VII. of chap. VIII. of the same part, 2 R. S. 488 to 493.

That as to the sale or other disposition of the real estate of infants, and the specific performance of contracts by infant heirs, at 2 R. S. 194 to 197.

That as to the care of the person, and the disposition of the estate of persons of unsound mind, at 2 R. S. 52 to 56.

The general act for the incorporation of religious societies, is that of 5th April, 1813. Laws of 1813, c. 60. Various amendments of that act have since taken place, and various local acts

passed by the Legislature, which will be found in vol. 3 of the third edition of the Revised Statutes, and in the laws of the different years since that edition was published.

The provisions of the Revised Statutes as to the powers of the Courts of Common Pleas over justices' judgments will be found at 2 R. S. 245 to 249.

The statute law as to ferries, at 1 R. S. 526 to 528.

That as to fisheries, at 1 R. S. 687 to 690.

As to turnpike roads, 1 R. S. 695 to 697.

As to wrecks, 1 R. S. 690 to 695.

As to physicians, 1 R. S. 452 to 456.

As to habitual drunkards, 2 R. S. 52 to 56.

(N. B. *In Re Paterson*, 4 How. 34, it was held that an habitual drunkard may, if thought proper, be authorized by order to make a will, without notice to his committee or next of kin.)

That as to imprisoned, insolvent, absent, concealed, or non-resident debtors, at 2 R. S. 1 to 52, i. e. in chap. V. of part II., title I. passim. See also Act of April 26, 1831.

As to the liberties of jails, 2 R. S. 432 to 437.

As to removal of occupants from State lands, 1 R. S. 205 to 208.

As to the laying out of railroads through Indian lands, Laws of 1836, c. 316.

As to appeals from the determination of commissioners of highways, 1 R. S. 518 to 521.

The general jurisdiction of the late Courts of Common Pleas will be found laid down in title V., chap. I., part. III. of the Revised Statutes, 2 R. S. 208 to 218, and in various local statutes, some of which will be found collected in vol. 2 of the third edition of those statutes, page 273 to 293, and the remainder in the laws of the different years subsequent to the publication of that edition.

The provisions as to the collection and remission of fines and forfeited recognizances, are contained in art. II., title VI., chap. VIII., part III. of the Revised Statutes, 2 R. S. 483 to 488.

On reference to the Codes of 1848 and 1849, it will be seen that the jurisdiction of these courts is most materially extended by the recent amendments. In the first place, they now possess original cognizance of actions in general, instituted for the recovery of either money or property, to the value of \$500, (but subject to the controlling powers of the Supreme Court,) which,

under the former measures, did not come within the scope of their jurisdiction. The local exceptions in this respect with reference to the counties of Kings and Erie, will, however, be noticed; Albany and Monroe were likewise excluded under the Code of 1851. In the second place, the statutory authorities, formerly vested in the Courts of Common Pleas, are more extensively attributed to them; and, in the third, by subdivision 13 as it now stands, the full powers of the higher Courts of Record, with reference to the review of their own decisions on case or exceptions, are, for the first time, distinctly given to them. They thus possess within themselves all the usual powers of courts of record, in reference to the decision of the questions submitted to them; though, of course, only within the limits of their peculiar jurisdiction, and subject, in all cases where a ministerial statute authority is not exercised, to the control of the appellate tribunal. Their proceedings are governed by the new rules of the Supreme Court, so far as they are applicable. Sec. 470. In the Codes of 1848 and 1849, the sittings of this class of tribunals were called and treated as general terms, although held by only one judge. In the present measure, however, this nomenclature is abandoned, and it will be seen by consulting section 31, that these courts are always open for the transaction of business in matters which are not litigated, and that at least two terms, and as many more as the judge may appoint, are to be held yearly in each county, for the trial of issues of law and fact in the ordinary course, at periods to be fixed by such judge, and to be advertised for at least four weeks in the State and county papers; with power for the designation of terms to be held for the trial of issues of law only, or of those proceedings at which no jury shall be required to attend.

The provisions of sect. 24, as last amended, confer the fullest powers of adjournment with reference to the different terms to be held as above stated.

The appellate jurisdiction of these tribunals has been before defined. Their decisions are reviewable by the general term of the Supreme Court, under chap. III. of title XI. of the second part of the Code.

By the amendments of 1851 and 1852, these tribunals are substituted for the Supreme Court, as the proper forum for the decision of questions of title, in suits originally commenced in the justices' courts, but discontinued under the provisions of secs.

55 to 62, inclusive. Sec. 63, as printed in the laws of 1851, has been omitted to be corrected in this respect, but that this is a mere clerical error is self-evident.

If a County Court entertain a suit for an amount exceeding the limits of its jurisdiction as above defined, the proceedings will of course be void. *Griswold v. Sheldon*, 4 Comst. 581; 1 C. R. (N. S.) 261.

In proceedings supplementary to an execution issued by the County Court, a judge of the Supreme Court has no power to make an order, and, if made, such order will be vacated. The power in this respect is limited by sec. 292 to a judge of the court or a county judge, and therefore the county judge alone has jurisdiction. *Blake v. Locy*, 6 How. 108.

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## CHAPTER VI.

### OF THE SUPERIOR COURT AND COURT OF COMMON PLEAS OF THE CITY OF NEW YORK.

#### § 19. *Jurisdiction and Powers of, generally considered.*

THOUGH, relatively speaking, of far higher authority than the courts treated of in the last division, these tribunals possess, in some features, an analogous jurisdiction. The superiority alluded to consists in the fact of their decisions being reviewable at once by the Court of Appeals, without any intermediate revision. Their jurisdiction is also, within its peculiar scope, unlimited in its nature, and unfettered by any restriction as to the form or amount of the controversies brought before it. These two tribunals are, in fact, of coördinate and equal authority with the Supreme Court, in all matters duly brought under their cognizance; and, although the decisions of the latter are, of course, always considered by them as entitled to the highest respect; still, wherever any disagreement of opinion has occurred, they have never hesitated to disregard the authority of those decisions, and to make rulings to the contrary effect.

The cases of *Ford v. Babcock*, 2 Sandf. 518, 7 L. O. 270; *The Washington Bank of Westervly v. Palmer*, 2 Sandf. 686, 8 L. O. 92,

and *Reynolds v. Davis*, 5 Sandf. 267, may be mentioned as three out of the many instances of the exercise of this discretion, appearing upon the recent reports. In the case of *Cashmere v. De Wolf*, 2 Sandf. 379, the powers of this court to assume jurisdiction of a matter which, under ordinary circumstances, would have been one of admiralty cognizance, were also distinctly asserted: and although, in *Sturgis v. Law*, 3 Sandf. 451, the court there refused to assume jurisdiction of a case arising out of salvage, still that decision proceeded on a general view of common law jurisdiction, and not on any point in connection with the special powers of these courts.

*Original Constitution of.*]—The statutory provisions for the constitution of the Court of Common Pleas, will be found at 2 R. S. 216, and in various subsequent acts, collected in the third edition of those statutes, vol. II., page 284 to 289. The organization of the Superior Court was effected by c. 137 of the laws of 1828, which act, and the subsequent provisions affecting it, will be found in vol. II., pages 311 to 317, and likewise at page 751 of vol. III. of the same edition, and in the laws of the different sessions subsequent to its publication.

*Provisions of Code.*]—The jurisdiction of these courts, and likewise of those treated of in the succeeding chapter, is thus defined by the Code:

§ 33. The jurisdiction of the Superior Court of the City of New York, of the Court of Common Pleas for the City and County of New York, of the Mayors' Courts of cities, and of the Recorders' Courts of cities, shall extend to the following actions:

1. To the actions enumerated in section one hundred and twenty-three and one hundred and twenty-four, when the cause of action shall have arisen, or the subject of action shall be situated, within those cities respectively.

2. To all other actions where all the defendants shall reside, or are personally served with the summons within those cities respectively, or where one or more of several defendants, jointly liable on contract, reside or are personally served with the summons, within those cities respectively, except in the case of Mayors' and Recorders' Courts of cities, which courts shall only have jurisdiction where all the defendants reside within the cities in which such courts are respectively situated. The Supreme Court may remove into that court any action brought under

this subdivision, and pending in the Superior Court, or Court of Common Pleas for the city and county of New York, and may change the place of trial therein, as if such action had been commenced in the Supreme Court; such order for removal and for change of place of trial to be made in the Supreme Court upon motion; and, on filing a certified copy of such order in the office of the clerk of the Superior Court, or of the Court of Common Pleas, such cause shall be deemed to be removed into the Supreme Court, which shall proceed therein as if the same had originally been commenced there; and the clerk with whom such order is filed must forthwith deliver to the clerk of the county in which, by such order, the trial is ordered to be had, to be filed in his office, all process, pleadings, and proceedings relating to such cause. Any action or proceeding pending in any Mayor's or Recorder's Court, in which the judge is for any cause incapable of acting, may by such court be transferred to the County Court; and thereupon the papers on file in the Mayor's or Recorder's Court shall be transmitted to the County Court; which shall thenceforth have jurisdiction of such action or proceeding.

3. To actions against corporations, created under the laws of this State, and transacting their general business, or keeping an office for the transaction of business within those cities respectively, or established by law therein, or created by or under the laws of any other State, government, or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed, or delivered within the State, or upon any cause of action arising therein.

The actions enumerated in subdivision 1 are all either real actions, or otherwise of a local nature, requiring trial by a local court, and, as such, peculiarly falling within the cognizance of these courts, as answering that description. Subdivision 2 is extended in operation, and somewhat altered in phraseology from the same provision as it stood in the Code of 1851. The extension is with reference to actions against defendants jointly indebted on contract; service on any one of whom within the limits is now sufficient to confer jurisdiction. Under these provisions, any cause of action whatsoever is now cognizable by these courts, provided the conditions precedent as to residence or service are satisfied; but it will be seen that, under the latter part of the clause, the Supreme Court possesses the same powers of removing actions from these courts into any other county within its own peculiar cognizance, which it possesses with reference to the change of the place of trial from one of those counties to another; and this power has been extended by the

last amendment, and made applicable to any action brought under this last subdivision, whether transitory or not, without restriction. This power, however, extended as it is, in no practical respect derogates from the coördinate authority of the New York tribunals, and is, in itself, one most essential to the ends of justice; in reference to cases in which the jurisdiction of the latter may have been acquired by casual service within their district, the real matter in controversy being situate elsewhere, and the evidence in support of that matter being only there attainable. It is evident that, where the parties all reside in New York, and the cause of action is either purely transient, or locally situate within that city, this power can never in practice be exercised, and therefore any conflict of jurisdiction on the subject is highly improbable.

The further provision, as to the removal of causes pending in a mayor's or recorder's court, in which the judge is incapable of acting, was also first inserted on the recent amendment, as a necessary corollary to the similar provision as to county courts, in subdivision 13 of sec. 30.

It seems clear that an order of this nature, on the part of the Supreme Court, removes the cause, and not merely the place of trial, notwithstanding the note at 2 C. R. 50.

The Superior Court itself has imposed analogous limits on its own jurisdiction in the case of *Ring v. McCoun*, 3 Sandf. 524, where it refused to entertain a cause, in which, (although in every other respect it was clearly within the scope of its cognizance, both as regarded the parties and the origin of the cause of action,) title to land in another county came, nevertheless, into question; and which county might, therefore, under sec. 123, be fairly contended to be the proper place of trial. A suit for specific performance of a contract does not, however, come within this category; a proceeding of that nature is not a real but a personal action. *Auchincloss v. Nott*, 12 L. O. 119.

*General Characteristics of both Courts.*—The powers and offices of the general, special, and trial terms of these courts, (the latter term being synonymous with that of Circuit Court,) are identical with those of the Supreme Court before noticed. The practice in them is regulated by the general rules of the latter tribunal; but the Superior Court has also published a further set of rules for its own guidance, with reference to the arrangement of the

business before it, and the mode of transacting that business. The Common Pleas has likewise made some few regulations on similar matters, particularly in reference to the hearing of appeals from the Marine and Justices' Courts. These rules will form the subject of constant citation throughout the work.

*Common Pleas—further Special Jurisdiction.*]—In addition to the powers which it possesses in common with the Superior Court, the Court of Common Pleas is also invested, by sections 34 and 352 of the Code, with the peculiar cognizance of appeals from the Marine Court of New York, and also from the Justices' Courts within that city, a branch of jurisdiction formerly exercised by the sister tribunal.

In addition to the above items of jurisdiction, the powers of this court have been recently extended by sec. 6 of c. 198 of the laws of 1854, in the following terms:

§ 6. The said Court of Common Pleas for the city and county of New York has power and jurisdiction of the following proceedings:

To remit fines and forfeited recognizances, in the same cases and in like manner as such power was heretofore given by law to Courts of Common Pleas, and to correct and discharge the dockets of liens and of judgments entered upon recognizances, and to exercise in the city and county of New York all the powers and jurisdiction now or hereafter conferred upon or vested in the said court, or the County Courts in their counties, and the powers and jurisdiction which were vested in the Court of Common Pleas for the city and county of New York before the enactment of the act designated as the Code of Procedure, passed April 12, 1848.

And, by the same statute, the appointment of a special clerk of that court, and the removal of all prior documents from the office of the clerk of the city and county of New York, is expressly provided for, with a view to its more complete and separate organization.

*Superior Court—Peculiar Characteristics of.*]—It would seem that doubts have been started as to the equity jurisdiction of the Superior Court, but, when examined into, those doubts appear to rest upon little or no foundation. The preamble of the Code, and sec. 69, when read in connection with the unlimited cognizance of actions within their local limits which is conferred upon these courts in general by sec. 33, and, moreover, with the peculiar cognizance of transferred equity cases given to the



Superior Court by sec. 47, are utterly and irreconcilably at variance with any such notion; and jurisdiction of this nature has been exercised by this court from the original passage of the Code, without any question whatever. To cite cases upon the subject would be really superfluous, as the exercise of that jurisdiction appears in almost every page of the five volumes of Sandford's Reports. *Cashmere v. De Wolf*, above cited; *Linden v. Hepburn*, 3 Sandf. 668; 3 C. R. 165; 5 How. 188; and *Mayne v. Griswold*, 3 Sandf. 463; may be taken as types of this class of cases, but to attempt to cite the whole of them would be unnecessary. The exercise of the same branch of jurisdiction is also recognized and acted upon by the Court of Appeals in *Palmer v. Lawrence*, 1 Seld. 389.

The decisions of this court have been very fully reported; and it need scarcely be said that those reports are of high authority, and possess, moreover, a general character of unity with each other, owing to the peculiar centralization of the court, and to that constant communication which takes place between all the judges composing it, which, in the more widely-diffused attributes of the Supreme Court, is, of course, physically impracticable. On more than one occasion those judges have taken high ground in asserting the dignity of their tribunal, and that, even as regards the Court of Appeals itself. See citation of case of *Nicholson v. Leavitt*, 4 Sandf. 253, 9 L. O. 105, and remarks thereon, and also on the unreported case of *Bowen v. Newell*, as contained in chap. III. of this book. See likewise the dissenting opinion of *Bosworth, J.*, in *Oakley v. Aspinwall*, 1 Duer, 1, 10 L. O. 79.

In addition to the justices of the Superior Court as originally constituted, provision is made by the Code, sec. 41 to 45, for the election of three additional judges, and for their classification in a manner analogous to that of the elected judges of the Court of Appeals; their future terms of office, after the expiration of those under such classification, to be six years. The jurisdiction of the judges so appointed is coëxtensive with that of the judges of the court under its original constitution, *Huff v. Bennett*, 2 Sandf. 703; 2 C. R. 139. In section 47 of 1849, provision was made for the transfer to this court of some portion of the arrears of issues of law and equity cases then pending in the Supreme Court, and, under section 49, the hearing of these transferred cases was, for a term of two years, to be the peculiar

office of the three judges to be so elected. By c. 2 of the laws of 1851, this last section was, however, repealed, and the three judges in question now exercise the general functions of judges of the court, without any distinction between them and those appointed under its original constitution. In *Giles v. Lyon*, 4 Comst. 600, 1 C. R. (N. S.) 257, it was held that the power of the Supreme Court in the foregoing respect was confined to equity causes existing at the passage of the Code, and that a cause subsequently commenced could not be so transferred to the Superior Court; and all the proceedings in a case of that description were accordingly set aside.

*Points as to General Jurisdiction of both Courts.*—On the subject of jurisdiction by service, the Superior Court has throughout been disposed to take a rigid view of its own powers. Thus, in *Delafield v. Wright*, 3 Sandf. 746, 1 C. R. (N. S.) 123, (a suit brought against two joint debtors, as such,) the objection that one of the defendants was neither a resident, nor served with process within the limits, was held to be fatal, and the complaint was dismissed for want of jurisdiction, notwithstanding that the resident defendant had appeared, and had put in a separate defence. See Note on the subject at 1 C. R. (N. S.) 341. In *Fisher v. Curtis*, 2 Sandf. 660, 2 C. R. 62, and *In re Carr*, *Ib.* 63, attachments which had been issued against non-resident debtors were, on similar grounds, held to be invalid, and it was distinctly laid down in the former case, that, to give the court jurisdiction, all the defendants must either be resident, or be served within the limits, according to the terms of the section. This rule is, however, relaxed, as regards the case of parties jointly indebted, by the recent amendment; service on any one of whom, or residence within the limits, is now sufficient to confer jurisdiction, and to sustain a judgment entered up against all on the joint indebtedness. Since that amendment, this court stands precisely on the same footing as the Supreme Court as to ulterior proceedings against absent defendants, where jurisdiction has been once acquired by service on any one of several joint debtors. *Anonymous case*, 1 Duer, 662. See likewise as to the subsequent exercise of jurisdiction once acquired, *The People v. Sturtevant*, Court of Appeals, 31 Dec., 1853. Of course this rule will not apply, where the liabilities of such parties are several, although arising under the same contract. Where, however, none of the

defendants reside within the limits, jurisdiction cannot be acquired for any purposes, without actual service, nor can an attachment be issued. *Granger v. Schwartz*, 11 L. O. 346. See also, as to the non-residence of plaintiffs with reference to an attachment, *Payne v. Young*, Court of Appeals, 12th April, 1853.

In cases where the jurisdiction arises under sec. 123 and 124, in respect of local matters, the non-residence of some of the defendants will form no ground of objection. See the principles laid down on this subject in *Cashmere v. Crowell*, 1 Sandf. 715; 1 C. R. 95; and asserted in the subsequent decision of *Cashmere v. De Wolf*, before referred to, although the particular provision of the Code of 1848, in respect of which that case was decided, has been repealed by the subsequent amendments.

Although service within the limits confers jurisdiction, without respect to the residence of the party so served, still the court will not sanction any attempt to bring a party within that jurisdiction by any fraud or misrepresentation, and will set aside a service effected by such means. *Carpenter v. Spooner*, 2 Sandf. 717, 2 C. R. 140, which decision appears to have been affirmed by the general term, 3 C. R. 23.

Where a defendant, irregularly served, gave notice of retainer, and afterwards moved to set the proceedings aside for want of jurisdiction, it was held in the Common Pleas that he was too late, and that the court had acquired jurisdiction by his voluntary appearance. *Smith v. Dipeer*, 2 C. R. 70. A similar conclusion was come to by the Superior Court in *Watson v. The Cabot Bank*, 5 Sandf. 423, where it was held that, where the court had otherwise jurisdiction of the action, a voluntary appearance conferred it as to the person.

In *Auchincloss v. Nott*, 12 L. O. 119, it was held that this court had jurisdiction of a suit for specific performance of a contract relating to property in another county, where jurisdiction had been otherwise acquired by service. A proceeding of that nature is not a real but a personal action. A jurisdictional objection of the above nature must be taken at the outset of the proceedings, or it will be waived; nor can the record of a judgment suffered to be thus taken, and asserting the facts which confer jurisdiction, be afterwards impeached collaterally. *Dyckman v. The Mayor of New York*, 1 Seld. 434.

In the matter of a petition, 5 Sandf. 674, a doubt was expressed whether the powers of the Superior Court extended to

the granting of process to compel the attendance of witnesses to be examined under a foreign commission, and the parties were recommended to apply to the Supreme Court under its unquestionable general powers, which course was accordingly pursued.

*In re De Angelis*, 1 C. R. (N. S.) 349, the question as to the powers of the Court of Common Pleas to award as to the custody of children, pending an action for divorce between their parents, was raised; and it was held that the custody of infants was a matter of special jurisdiction, formerly vested in the Court of Chancery alone, and was therefore not a necessary incident to the action of divorce, but of a distinct and independent nature. It was accordingly decided that the powers of the Court of Common Pleas did not extend so far as to enable them to make any award on the subject, and that the Supreme Court was the only competent tribunal for that purpose.

Similar doctrines have been held by the Superior Court, where the question came up on habeas corpus, in *The People v. Porter*, 1 Duer, 709; 11 L. O. 228; and they were also strongly asserted in relation to the same matter by *Barculo, J.*, in the Supreme Court, in *The People v. Cooper*, 8 How. 288.

In the former of the last two cases, it was held by *Duer, J.*, that a judge of the Superior Court possessed no independent powers in relation to the granting of a habeas corpus, but merely those of a Supreme Court commissioner. Jurisdiction of an analogous nature was, however, exercised by *Paine, J.*, in relation to the discharge of certain persons detained as fugitive slaves, in *The People v. Lemmon*, 5 Sandf. 681.

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## CHAPTER VII.

### OF THE MAYORS' AND RECORDERS' COURTS OF CITIES.

#### § 20. *Powers and Jurisdiction of.*

It will not be necessary to detain the reader at any length on the subject of the powers and jurisdiction of these courts, as, with reference to the cognizance of actions in general, they are substantially the same as those treated of in the last division,

with this important exception, that mere service within the limits is not here sufficient to confer jurisdiction, but, under subdivision 2 of sec. 33, as before cited, absolute residence of all the defendants within the city in which each of such courts is situated, is an absolute prerequisite to its exercise of any functions whatever, except in cases strictly local in their nature, and falling as such within subdivision 1 of that section. These courts are likewise devoid of any appellate jurisdiction whatever, and their own proceedings are not subjects of review by the Court of Appeals, until they have been previously submitted to the intermediate jurisdiction of the Supreme Court.

The recent provision as to removal into the Supreme Court of cases pending in these jurisdictions, in which the judge is in any manner incapable of acting, will of course be noticed.

It would seem that by the terms of sec. 470, if strictly construed, the rules of the Supreme Court are not binding upon these tribunals, but only on the County Courts; but there can be little doubt that, in practice, they will be found the safest, if not the only safe guides to follow.

The statutory provisions on the subject of the organization of these courts will be found collected in volume 2 of the third edition of the Revised Statutes, pages 293 to 311. The cities in which they are thereby established, are Albany, Hudson, Troy, Buffalo, and Utica, and also Rochester; but the last court has since been abolished by c. 303 of the laws of 1849. In vol. 3 of the same edition, pages 702 to 708, inclusive, will be found various provisions in relation to the same courts, and also those establishing a similar court in the city of Oswego, subsequently amended by c. 134 of the laws of 1849.

The City Court of Brooklyn was established by c. 125 of the laws of 1849, amended by c. 102 of the laws of 1850.

By c. 138 of the latter, the act as to the establishment of these courts in Buffalo is amended.

The former of the two tribunals last mentioned is one of great and increasing importance. It possesses, in common with others of this class, in which the whole business is carried on by a single judge, this peculiar and exceptional feature, viz., that the report of a referee, when impeached, must be reviewed in the first instance on motion by the judge of the court, before an appeal from the judgment founded on that report can be carried up to the higher tribunal. *Goulard v. Castillon*, 12 Barb. 126.

This review stands in the place of the appeal to the general term of the same tribunal in the courts of larger jurisdiction, and is expressly contemplated, though only indirectly referred to in the acts above cited.

In *Griffith v. Griffin*, 6 How. 428, before cited, it was held that the act of the Legislature, conferring upon the recorder of Troy the powers of a county judge, was unconstitutional, and his acts under it void. This principle, if confirmed, is doubtless applicable to all courts falling within this category.

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## CHAPTER VIII.

### OF JUSTICES' COURTS IN GENERAL, INCLUDING THE MARINE AND JUSTICES' COURTS IN THE CITY OF NEW YORK.

#### § 21. *Powers and Jurisdiction of.*

IN pursuing the analysis of the different courts of civil jurisdiction within this State, whose practice and proceedings are affected by the Code, we come, in the last place, to the courts of inferior jurisdiction above enumerated. For all general purposes, the powers of these different courts are substantially the same, though the Marine Court, under sec. 65, possesses peculiar authority in reference to actions on contract, in respect of services performed, or of tort, for injuries committed on board vessels in the merchant service: subject however, in all respects, to the paramount authority of the United States' Courts, in cases of admiralty or maritime jurisdiction. The powers and scope of the Marine Court have been recently increased by the Legislature, and it is become in consequence a tribunal of much greater utility and importance. It now possesses cognizance of controversies to the value of \$500, and is invested with the power of reviewing its own decisions in general term.

The statutory provisions on these subjects will be found in c. 617 of the laws of 1853, p. 1165. By that statute it is provided that an appeal of this nature shall have the same effect as that to the general term of the courts of higher jurisdiction. The Legislature has however omitted to define whether this form of appeal is optional or imperative, and also whether, in the event

of its being taken, the time for the appeal to the Court of Common Pleas is thereby extended. The latter tribunal has held that such is not the case, and that the only appeal which it, as the appellate court, can recognize, is from the decision of the single justice, and that, taken within the statutory period of twenty days from the judgment on that decision. *Heidenheimer v. Lyon*, unreported. This form of appeal has, however, been so far recognized by the same tribunal as to hold that, during its pendency, a stay of proceedings on an execution issued out of the court above will be granted, though not as of right, but on a special application for that purpose.—*Ritterband v. Maryatt*, 12 L. O. 158.

The enlargement of jurisdiction of the Marine Court was held not to be retrospective, so far as regards the question of costs, in *Dunbar v. Duffy*, 11 L. O. 349.

The general provisions on the subject of Justices' Courts are contained in title VI. of part I. of the Code, and the boundaries of their jurisdiction are laid down in sec. 53, when read in connection with the provisions of sec. 65, above referred to, and also with those in reference to actions upon the charters or by-laws of the corporations of the different cities in which Justices' Courts are held, contained in the same and the two following sections.

The plan before laid down for the general scope of the work, forbids any lengthened discussion on the subject of this jurisdiction; but it may be shortly defined as limited, in ordinary cases, to causes of action where the value of the matter in dispute does not exceed \$100 in the Justices', and \$500 in the Marine Court, but as comprising a very general cognizance of controversies within that limit, save those only which, by sec. 54, are made the subjects of special exception. In actions on surety bonds taken by these courts in the exercise of their jurisdiction, their powers are of wider extent; and, in reference to the taking of judgments by confession, under the provisions of the Revised Statutes, those powers extend to all cases where the amount confessed does not exceed \$250. A plaintiff cannot, however, split up an undivided demand into different actions for the purpose of conferring jurisdiction; though it would seem he may consent to reductions, or, on too large a recovery, may remit the excess for that purpose. It would seem, also, that by consent of the defendant, but not otherwise, a larger demand may be divided,

in order to the confession of separate judgments for different portions of it.

By sec. 54, the following causes of action are excepted from the jurisdiction of these courts :

1. Cases to which the people are a party, except for penalties within the limitation above laid down.

2. Cases in which the title to real property shall come into question.

3. Civil actions for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction. By the act of 1853, above cited, the Marine Court is invested with special jurisdiction over all this class of actions, (except those for criminal conversation and seduction,) where the damages claimed do not exceed \$500.

4. Matters of account where the sum total of the accounts of both parties to the controversy exceeds \$400 ; and,

5. Actions against executors or administrators as such. N. B.—Parties standing in these capacities are, however, competent to sue as plaintiffs, and the defendant, in that case, may plead, and if he prevail, may enter and enforce judgment for a set-off, as in the higher courts.

With reference to No. 4, it might probably be held, that an action may be maintained in respect of a balance actually struck and settled, though the aggregate items of the accounts on which it arises exceed \$400, provided no question arises on the accounts themselves as such. When, however, such is the case, and it would seem that, whenever the objection is formally taken, the court has no jurisdiction, however small the actual balance may be. *Lockwood v. Isaacs*, 1 C. R. 29.

## § 22. *Discontinuance before Justice where Title in question.*

The mode of assertion of the defendant's claim to exemption from suit in these courts, where the title to real property may come into question, is pointed out by sections 55 to 59 inclusive. (The power given to the justice by sec. 62 to continue any personal causes of action, independent of those stayed on this account, will of course not be overlooked.) The course to be pursued, on this objection being taken, is the putting in of a written answer, showing such to be the case, accompanied by an undertaking, executed by one or more sufficient sureties, in a



penalty of \$100, conditioned for the giving a written admission of service of summons and complaint in the County Court, in the event of the same being deposited with the justice within thirty days thereafter, such admission to be given within ten days from the time of that deposit; and conditioned also for the defendant's rendering himself amenable to all process of that court in those cases where, at the time of giving the undertaking, he has already been arrested under the authority of the inferior tribunal. It would be prudent, on the preparation of an undertaking of this nature, to follow the rules hereafter laid down with reference to those required by the Superior Courts, though this does not appear to be imperative, but to rest in the discretion of the justice. In *Davis v. Jones*, 4 How. 340, 3 C. R. 63, it was held that the limitation of ten days in the above provision is absolutely imperative, and that the court above possesses no power of curing the defect by amendment, if the defendant, through ignorance of the deposit of the summons and complaint with the justice, (of which it would seem the plaintiff is not bound to give any notice,) omit to furnish the required admission within the period so limited; the mere deposit of the summons not being a commencement of the action sufficient to give the court jurisdiction to exercise its general powers of amendment under sections 173 and 174.

If, however, the plaintiff accept an answer put in in the higher court, without the formal admission, as above provided, it will be considered as a waiver of the objection, and the subsequent proceedings will stand. *Wiggins v. Tullmadge*, 7 How. 404. The giving the undertaking is, however, essential. *Lalliette v. Vankeuren*, 7 How. 409.

On the delivery of the undertaking above described, the cause is to be discontinued before the justice, but, if the defendant omit to take this step, his jurisdiction is restored, notwithstanding the answer; and the defence of title being in question will then no longer be admissible, unless that fact appear on the plaintiff's own showing, in which last event the action cannot be maintained, but must be dismissed with costs; and it would seem that in such cases the justice cannot take cognizance of the cause even by consent. See *Striker v. Mott*, 6 Wendell, 465.

Where, however, the fact that title is in question appears by the complaint, and the defendant omits to take the objection in the manner above prescribed, the justice's jurisdiction remains,

and the defendant will be precluded from availing himself of the benefit of the 59th section at the trial. *Adams v. Rivers*, 11 Barb. 390.

Where, too, the title to real estate is not pleaded, the justice will not be ousted of his jurisdiction, merely because it may be necessary to prove it in order to sustain the action, unless such title is disputed by the defendant. *Bellows v. Sackett*, 15 Barb. 96.

The point as to whether title to lands does or does not come in question, appears to be cognizable by the justice in the first instance, where there is no reasonable doubt on the subject, but not where any such doubt exists. Whenever any real point of this nature arises, the case is likely to be one of difficulty, and can only be dealt with by the higher tribunal. The mere pleading of a grant of the Legislature, in an action brought for the assertion of a public right, was held in *Browne v. Scofield*, 8 Barb. 239, (an action for damages for obstructing a navigable river,) as not in its nature a case of claim of title to lands sufficient to oust the justices' jurisdiction. The assertion of a private right of way has, however, been uniformly held to be a question involving title. See *Striker v. Mott*, above referred to; *Boyce v. Brown*, 3 How. 391; 7 Barb. 80.

It will be observed, on a comparison of the Codes of 1849 and 1851, that the County Court is now substituted for the Supreme Court, as the tribunal in which the action in lieu of that discontinued before the justice is, for the future, to be brought in all cases. See, however, the error in printing sec. 68, before noticed.

On the bringing of such substituted action, the suit is in effect one in the County Court, and judgment is to be entered on its decision as such. In one respect, however, the proceedings differ, and that is with reference to the pleadings. It was at first held that these must be the same as those before the justice, and that they could not be amended in matters of substance, and also that a reply could not be now put in, in such a suit, under any circumstances. *McNamara v. Bibly*, 4 How. 44; *Cusson v. Whalon*, 5 How. 302; 1 C. R. (N. S.) 27; *Wendell v. Mitchell*, 5 How. 424. This view is, however, controverted by the decisions in *Kibbe v. Degroot*, 1 C. R. (N. S.) 202 and 272, and *Jewett v. Jewett*, 6 How. 185; and the point has since been settled by the Court of Appeals in *Wiggins v. Tallmadge*, 7 How. 404, where it is laid down that the provision that the defend-

ant's answer is to be the same, does not require the same identical words, but only the same substantial defence. It was also held that the defendant in such cases is at liberty to abandon part of his original defence, provided the remainder of it was not varied from the grounds originally taken.

For the purposes of appeal, proceedings of this nature will be held to be actions in a Justices' Court, and the Court of Appeals has accordingly no jurisdiction to review the decision of the Supreme Court thereupon. See *Brown v. Brown*, 2 Seld. 106; 6 How. 320; *Pugsley v. Kesselburgh*, 7 How. 402; *Wiggins v. Tullmadge*, 7 How. 404.

### § 23. *Proceedings in Courts in question.*

A system of rules with reference to the pleadings and practice in these courts, is laid down by section 64 of the Code, which, in a great many respects, but not altogether, supersedes the provisions of the Revised Statutes in reference to these tribunals in general, including the proceedings therein, the removal thereof by certiorari, and the review of their decisions. The whole of those provisions must therefore be still made the subjects of careful study, in connection with those of the Code. They will be found in titles III. and IV. of chap. II., part III. of the Revised Statutes, 2 R. S. 224 to 275, and in various subsequent acts on the same subject, collected in the third edition, vol. II., pages 323 to 373, and likewise at pages 708 and 709 of vol. III. The original constitution of the Marine Court will be found in the Revised Laws of 1813, its further organization in c. 144 of the Laws of 1849, and its recent reorganization and enlargement in Laws of 1852, c. 389, and Laws of 1853, c. 617. Chapters 22 and 53 of 1849 contain provisions with reference to the Justices' Courts of Rochester and Hudson, whilst c. 196 and 514 of the Laws of 1851 have reference to those in the city of New York. The style of the latter tribunals is changed from Justices' Courts to District Courts by c. 324 of the Laws of 1852. By c. 65 of the Laws of 1854 an additional judicial district is created. In certain respects, such as the form of summons and other proceedings not expressly provided for by the Code, the Marine Court and Justices' Courts of New York are governed by their own statutory practice, and not by that prescribed by the Revised Statutes in reference to justices' courts in general. See

*Williams v. Price*, 2 Sandf. 229; *Cohn v. Coit*, 3 C. R. 23; *Jackson v. Wheedon*, 3 C. R. 186; *Klenck v. De Forest*, 3 C. R. 185, and other cases. In all matters, however, which are regulated by the provisions of the Code, those provisions are applicable to all, without distinction. See sec. 68. The Marine Court have recently issued a set of rules for the government of their practice in various respects, and particularly with regard to motions, and the hearing of arguments before the general term under the recent extension of their powers in this respect.

The leading characteristic of the system thus established is the admissibility of oral and unverified pleadings in all cases, except where an answer of title being in question has been put in; coupled with the most unlimited powers of amendment and disregard of mere technical objections.

In *Turck v. Richmond*, 13 Barb. 533, it was even held that when a defence before a justice is overruled as insufficiently pleaded, he is bound not merely to allow, but to order the pleading to be amended. By subdivision 15 of section 64, the provisions of the Code respecting the forms of and parties to actions, the times of commencing them, the rules of evidence, and the service of process on corporations, are made applicable to these courts; the last of these particulars being a provision on the recent amendments; but, in all other respects, as before adverted to, the practice in them is totally diverse from and irreconcilable with that of the higher courts, as established by that measure. It remains to notice some few decided points in reference to that practice, which may bear upon the exercise of the appellate jurisdiction of the courts above. In *Warren v. Helmer*, 8 How. 419, it was held that s. 399 of the Code, requiring ten days' notice to be given of the examination of an assignor as a witness, was not "a rule of evidence," and was therefore not applicable to these courts.

The jurisdiction of these courts being of a limited nature, is of course subject to the same strict rules before adverted to, under the head of county courts. The mere issuing of a summons, however, *prima facie*, confers jurisdiction; and if such summons be served within the limits of the authority of the court, the presumption will lie that it was duly served. If a warrant be issued, the reverse is the case, and the facts warranting its issue must all be strictly proved. *Barnes v. Harris*, 4 Const. 374. No presumption will, however, be admitted, even

in this case, to oust the jurisdiction, if enough be shown to bring the case within the general language of the statute. *Foster v. Hazen*, 12 Barb. 547. See also *Van Kirk v. Wilds*, 11 Barb. 520. At the same time, the jurisdictional defect for want of proper service of summons can be taken advantage of on appeal, if sufficient cause be shown; *Fitch v. Devlin*, 15 Barb., 47.

The justices' courts have jurisdiction in actions against domestic, but none whatever in those against foreign corporations. This last objection is, however, capable of being waived, if the defendants appear and plead to the merits, without insisting on it. *Paulding v. Hudson Manuf. Co.*, 3 C. R. 223.

A certain class of jurisdictional objections cannot nevertheless be waived, even by submitting to an actual trial. As, for instance, in an action brought in a justices' court, where judgment for \$200 was claimed, *Bellinger v. Ford*, 14 Barb. 250, or the bringing the action against a non-resident defendant by long summons, contrary to the statute, Laws of 1831, p. 403, ss. 33, 47; *Robinson v. West*, 11 Barb. 309; *Cornell v. Smith*, 2 Sandf. 290, there cited; see also *Allen v. Stone*, 9 Barb. 60. See as to the mode of obtaining a short summons, *Waters v. Whitmore*, 13 Barb. 634. Long summons is, however, *prima facie*, the proper remedy in all cases, unless the contrary is shown. *Allen v. Stone*, 9 Barb. 60.

In *Johnson v. Cayuga and Susquehanna Railroad Company*, 11 Barb. 621, it was held that the above provision could not be held applicable to a non-resident corporation, and that the ordinary proceeding by long summons was the proper course in such cases. In *Sherwood v. The Saratoga and Washington Railroad Company*, 15 Barb. 650, it was held that a short summons issued against such a corporation was a nullity.

The mode of obtaining the cognate remedy of attachment is pointed out in *Vankirk v. Wilds*, 11 Barb. 520. It would seem that the deposition required for the purpose of obtaining it need not be in writing, but may be oral; *Baker v. Williams*, 12 Barb. 527; though the former is the more convenient course. The appearance of the defendant on the return of an attachment supercedes the necessity of a subsequent summons. *Conway v. Hitchins*, 9 Barb. 378. The bond required by the statute is imperative, and, if omitted, all the proceedings will be void. *Davis v. Marshall*, 14 Barb. 96; see *Bennett v. Brown*, 4 Comst. 254, 1 C. R. (N. S.) 267, there cited. See also *Allen v. Stone*, 9 Barb. 60. A formal defect

in the constable's return was disregarded, and a summons subsequently issued and sustained, in *Rosenfield v. Howard*, 15 Barb. 546.

In the city of New York, where the jurisdiction of these courts is exercised with reference to the different wards of that city, the residence of one party within a ward is sufficient to confer jurisdiction; but, where both are non-resident, the objection will be fatal, and cannot be waived. *Murphy v. Mooney*, 2 Sandf. 288; *Cornell v. Smith*, Id. 290.

It was at first held that the summons must of necessity state on its face the cause of action, or, if not, it would be held to be a nullity, and no jurisdiction would be conferred. *Ellis v. Merritt*, 2 C. R. 68; *Cooper v. Chamberlain*, 2 C. R. 142. This view has however been distinctly overruled in *Cornell v. Bennett*, 11 Barb. 657, (see also *Park v. Hitchcock*, there cited in note,) and *Smith v. Joyce*, 12 Barb. 21. The defect, it was held in the former case, is amendable, and one that will be waived by the defendant's failure to appear and object when the case is called.

The summons must not be for a shorter term of notice than that prescribed by statute, *King v. Dowlall*, 2 Sandf. 131; and the service of it must be properly and duly authenticated. *Manning v. Johnson*, 7 Barb. 457. The two last defects will, however, be waived by appearance and answer without objection. *Heilner v. Burras*, 3 C. R. 17. *Robinson v. West*, 1 Sandf. 19.

Service of the summons on one defendant will authorize the entry of judgment against others jointly sued in contract. *Fogg v. Child*, 13 Barb. 246. In actions for a tort, however, the contrary is the case, and judgment so entered will be altogether void. *Farrell v. Calkins*, 10 Barb. 348. It would seem that the justice may deputize a competent party to effect such service in lieu of the regular constable. *Monteith v. Cash*, 10 L. O. 348. See also *Borroduile v. Leek*, 9 Barb. 611. He cannot however delegate any part of his general official authority, and, if he do so, the acts of such deputy will be void.

Objections in the nature of a demurrer must be raised by the pleadings, or they cannot be taken afterwards. *Jackson v. Wheeldon*, 3 C. R. 186. On the same principle, a plea of the general issue was held to be sufficient on which to ground the introduction of any testimony at the trial, where no objection was made to it for want of certainty, at the time of the joinder of issue. *Durfee v. Evenden*, 8 Barb. 46.

If the complaint be demurrable, the defendant must object to

it at once in that form. If he take issue upon it, he cannot afterwards object to it on appeal, on formal grounds. *Neff v. Clute*, 12 Barb. 466. And, even if a demurrer have been taken and overruled, the defendant, by putting in an answer, will waive the objection, and the appellate court cannot in such cases review the decision on the demurrer. *Irvine v. Forbes*, 11 Barb. 587. The principle that the court may disregard all matter in abatement, where the defendant relies on the merits, is also laid down in *Monteith v. Cash*, 10 L. O. 348.

The Code does not authorize the joinder of causes of action on contract and in tort in the same complaint in these courts, any more than in courts of record. The remedy in such case is to require the plaintiff, upon joining issue, or before proceeding to trial, to elect to which class of actions he will be confined. *Burdick v. McAmbly*, 9 How. 117.

A plea of payment or set-off in these courts, is an admission of the plaintiff's case, nor can the latter be contested under such circumstances, if the defence on the above grounds fails. *De Courcy v. Spalding*, 3 C. R. 16; *Young v. Moore*, 2 C. R. 143. In *Everitt v. Lisk*, 1 C. R. 71, a refusal to answer was held to be an admission of the plaintiff's claim, and to preclude the defendant from his right to a cross-examination. This decision was, however, under the Code of 1848, prior to the establishment of the present rules by sec. 64.

The plaintiff cannot take judgment by default, without proving his case; *Muscott v. Miller*, 6 L. O. 423; *Smith v. Falconer*, 1 C. R. 120; 2 Sandf. 640; a point indeed clear on the terms of the section itself. Nor can he, under any circumstances, take judgment for an amount greater than that mentioned in the summons. *Partridge v. Thayer*, 1 C. R. 85; 2 Sandf. 227. A judgment taken on the plaintiff's default to furnish a bill of particulars was held to be bad, under the Code of 1848, in *Winslow v. Kierski*, 2 Sandf. 304, but the amended measures contain special provisions on this subject.

In *Mills v. Winslow*, 3 C. R. 44, it was held that an action on the judgment of an Assistant Justice's Court, brought without the leave prescribed by sec. 71, could not be maintained; the judge treating those courts, and also the Marine and Assistant Justices' Courts of New York, as not within the definition of "Courts of a Justice of the Peace." See also *Cohn v. Coit*, 3 C. R. 23. In *McGuire v. Gallagher*, 2 Sandf. 402, 1 C. R. 127, a

contrary view is taken on this point, and it was also held that the restrictions in sec. 71 are in no manner retrospective, in relation to causes of action accrued before the passage of the Code.

The ordinary principles of law with reference to the regular conducting of a trial by jury, are applicable to those taking place in these courts. In *Bell v. Davis*, 8 Barb. 210, a judgment was accordingly reversed because the minutes of counsel had been laid before the jury. Where, however, at the request of the parties, the justice went into the jury-room, while they were deliberating on their verdict, a consent that he should read certain testimony to them was implied; *Hancock v. Salmon*, 8 Barb. 564; nor will the due exercise of the justice's discretion on the trial be interfered with, as, for instance, his refusal to allow additional evidence to be taken, after a motion for a nonsuit. *Reed v. Barber*, 3 C. R. 160.

The justice cannot, it seems, receive the verdict of the jury in the absence of the plaintiff; and, if he does so, his judgment will be reversed. *Douglass v. Blackman*, 14 Barb. 381. Where, however, the justice returned that the jury delivered their verdict to him in court, it will be inferred that it was done regularly, though, *prima facie*, the circumstances seemed inconsistent. *Beattie v. Qua*, 15 Barb. 132.

The judgment of a justice on questions of fact is, as a general rule, conclusive, as in other similar cases. *Adsit v. Wilson*, 7 How. 64; *Kasson v. Mills*, 8 How. 377. And, in reviewing such judgments in general, immaterial errors will be overlooked. *Dunkle v. Kocker*, 11 Barb. 387; *Buck v. Waterbury*, 13 Barb. 116.

The justice is, by statute, bound to give his judgment within four days after the hearing of the cause. In *Bissell v. Bissell*, 11 Barb. 96, it was held that, contrary to the rules of practice in ordinary cases, Sunday is not excluded from, but included in the computation. A judgment rendered on Monday, Sunday being the fourth day in that case, was accordingly held to be void, as not being entered in due season.

In these courts, the strict rules which bind the judges of the higher tribunals, do not prevail; and, therefore, the partner or clerk of the justice may practice before him. *Fox v. Jackson*, 8 Barb. 355.

The judgments of these courts are enforceable by process issued under their authority, according to the powers conferred



on them by the Revised Statutes, (such powers embracing that of arrest in many cases,) but those judgments are not liens upon real estate, unless transcripts of them are docketed in the office of the clerk of the county, as prescribed in sec. 63, and unless for sums exceeding \$25. The delivery of such a transcript on the part of the justice is compulsory, and may be enforced by mandamus. From the time of docketing, they become in effect judgments of the County Court, and are in all respects enforceable as such. It would seem though that, in one respect, they acquire no greater weight by this process, but still remain on the footing of judgments of inferior courts; and that the lien on them, unless revived, will accordingly cease at the expiration of six years. *Young v. Remes*, 4 Barb. 442. See 2 R. S. 359, sec. 5. As regards the statute of limitations, however, all judgments whatever seem now, by sec. 90 of the Code, to be placed on an equal footing. The transcript must correspond with the judgment in all respects, or the docketing will be void, nor can any material variance be either amended or disregarded by the court above. *Simplins v. Page*, 1 C. R. 107. A defect in the issuing of execution, on the ground that the judgment had not been properly docketed, was, however, held in *Roth v. Schloss*, 6 Barb. 308, to be amendable, and the judgment was there allowed to be docketed *nunc pro tunc*.

In *Bander v. Burly*, 15 Barb. 604, it was held that the provisions of the Revised Statutes, in relation to the dates at which executions from these courts were made returnable, are repealed by the Code; and that the period of sixty days, prescribed by the latter measure, now applies in all cases. The provisions under the former law in relation to the subsequent renewal of those executions, and the periods for which renewal may be made, were held on the contrary to be still in force, and to govern executions of this nature after the period of the original return. The appeal from all these tribunals lies, as before stated, to the county courts, or, in New York, to the Court of Common Pleas of that city.

## BOOK II.

### OF ACTIONS GENERALLY CONSIDERED.

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#### CHAPTER I.

##### OF ACTIONS IN GENERAL.

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#### § 24. *General Definitions.*

THE Code, in s. 1, classes remedies in courts of justice under the two heads of actions and special proceedings, giving in s. 2 and 3 the following definitions of each:

§ 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3. Every other remedy is a special proceeding.

It then proceeds, in sections 5 and 6, to draw the distinctions between civil and criminal actions; declaring in section 7, that where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

These provisions are, in substance, little more than declaratory of the old and inherent distinctions between ordinary and special proceedings, and likewise between those appertaining to civil, in contradistinction to criminal jurisdiction. With the exercise of the latter, the Code, as it now stands, has no concern, and therefore the subject may be at once and permanently dismissed, merely drawing the reader's attention to section 7, above cited, under which both civil and criminal proceedings

are capable of being taken in conjunction with each other, in relation to the same act, or state of circumstances.

The boundaries between ordinary actions and special proceedings are less capable of accurate definition, and many of the measures which will hereafter be treated of in connection with the due prosecution of the former, are, perhaps, strictly considered, rather of the latter nature; as, for instance, proceedings supplementary to execution, (see *Davis v. Turner*, 4 How. 190; *Dunham v. Nicholson*, 2 Sandf. 636,) and other similar steps in the ordinary assertion of the remedies obtainable by action. In practice, however, this distinction is unimportant.

### § 25. *Alternative Remedies and Special Proceedings.*

There exists, likewise, in relation to real estate, a certain class of proceedings of a mixed nature, and which may be originated and carried on, either in the form of an action, or in that of a special proceeding, and under the forms of either the old or new practice, at the election of the parties. Of this nature are proceedings for partition. See *Watson v. Brigham*, 3 How. 290; 1 C. R. 67; *Buckus v. Stilwell*, 3 How. 318, 1 C. R. 70; *Traver v. Traver*, 3 How. 351; 1 C. R. 112; *Myers v. Rasback*, 4 How. 83, 2 C. R. 13; *Row v. Row*, 4 How. 133,—and various other cases subsequently cited under that head; and likewise those for the admeasurement of dower, see *Townsend v. Townsend*, 2 Sandf. 711. Proceedings to compel the determination of conflicting claims to real property would seem, however, not to fall within this class, but to belong to that of strictly special proceedings, notwithstanding the provisions of the Code to the contrary in section 449. *Crane v. Sawyer*, 5 How. 372, 1 C. R. (N. S.) 30.

The different special proceedings which may be taken during the ordinary course of an action, will be treated of in due course in connection therewith; and those prescribed by the Code itself in reference to the preliminary settlement of controversies, will form the subject of an introductory chapter. The remedies unconnected with the ordinary progress of a suit, and obtainable under special statutory provisions, will be shortly noticed at the conclusion of the work; but, in accordance with its general plan, they will not be entered upon in detail, inasmuch as they are governed in all respects by the

forms of the Revised Statutes, or other independent enactments on the subject, and by the rules of the former practice.

### § 26. *General Observations*

By the preamble to the Code, the then present forms of actions and pleadings in cases at common law, and the distinction between legal and equitable remedies, are entirely abolished; and, with that abolition, the multiplicity of nice and subtle distinctions between the different forms of actions, which formed so distinguishing a feature of the old practice, together with the numerous and intricate questions of law connected therewith, are at once and for ever annihilated. By the same preamble, when read in connection with the provisions of section 69, the formal lines of demarcation between legal and equitable remedies, and between actions at law and suits at equity, together with the previously existing forms in those actions or suits, are likewise completely swept away; and one uniform course of proceeding in all cases, whether in relation to the enforcement of private rights, or to the redress of private wrongs, to be taken in one single form of action, denominated a civil action, is distinctly and in terms established in their stead. By these provisions, the main features of the ancient and complex system, together with the numerous distinctions and conflicts of jurisdiction, incident to the administration of law and equity by separate tribunals, are, beyond question, entirely superseded.

It is impossible, indeed, to conceive a more complete and radical abolition of the ancient forms and practice, than that effected by these provisions; and, so far as matters of form alone are concerned, the conclusion to be drawn from them is irresistible. Although, however, the preamble seems to contemplate the abolition of all distinction between legal and equitable remedies also, that abolition is, to some extent, and must always continue, impracticable. The Code itself, in numerous respects, and particularly in the institution of two different forms of summons, and the enabling provisions for the trial of causes by the court, contains a practical recognition of the separate nature of those two branches of jurisdiction, which the preamble in terms professes to amalgamate. The mere common law or statutory action, involving a simple recovery upon a simple and

certain issue; and the complicated decree in chancery, embracing the concurrent dealing with a combination of intricate and often conflicting rights, and the adaptation of proportionate relief in respect of those rights generally considered, are, in their very essence, so completely diverse, that no human wisdom could establish any one uniform system, which would completely adapt itself to both these states of circumstances, or under which adequate justice could be meted out in every case arising under them. As regards certain general principles, all good pleading, whether legal or equitable, has always been substantially subject to similar rules; and, under the new system, those general principles are now of far wider scope and far more general adaptability; but still there must ever remain a wide and irreconcilable difference between the statements on which a mere money recovery may be obtained, and those which are requisite in order to ground a title to special or conflicting relief, under a more complicated state of circumstances. This branch of the subject is, however, so fully considered hereafter, in that portion of the work devoted to the consideration of pleading in a general point of view, in which the different cases on the subject will be found cited in detail, that it would be superfluous to dwell further upon it for the present.

Though abolished in form, the old classification of actions arising *ex contractu* or *ex delicto*, still practically subsists, so far at least as regards the nature of the remedies obtainable in such actions; and, with reference to the nature of the relief to be granted, and of the statutory limitations imposed, an equally broad line of demarcation may still be drawn between actions in relation to the recovery of real estate, or to the enforcement of claims upon property as such, and those where the relief sought for is capable of being represented by a simple money payment. It would, however, be a superfluous anticipation to enter at this juncture into the details of these distinctions, which will be duly drawn and commented upon, when different proceedings in such actions are brought under consideration.

The question as to how far the provisions of the Code are or are not retrospective, in relation to proceedings in actions or suits commenced before its passage, will be found fully considered in the concluding chapter of the work.

## CHAPTER II.

## OF THE PARTIES TO AN ACTION.

§ 27. *General Principles as to.*

By the provisions of the Code, the old common law doctrine with respect to parties is in effect superseded, and the rules which prevailed in equity substituted, with scarcely any modification. See *Wallace v. Eaton*, 5 How. 99, 3 C. R. 161, and *Hollenbeck v. Van Valkenburgh*, 5 How. 281; 1 C. R. (N.S.) 33. In some few cases, however, the old common law principles have been upheld, as in *The Merchants' Mutual Insurance Company v. Eaton*, 11 L. O. 140, with reference to the assignment of a cause of action in tort; and *Spencer v. Wheelock*, 11 L. O. 329, where it was held that parties liable for the same debt under different contracts could not be joined in the same action. See also *De Ridder v. Schermerhorn*, 10 Barb. 638.

The intentions of the commissioners of practice and pleading in framing these provisions, may thus be stated in their own words, taken from page 123 of their report :

“The rules respecting parties in the courts of law, differ from those in the courts of equity. The blending of the jurisdiction makes it necessary to revise these rules to some extent. In doing so, we have had a three-fold purpose in view; first, to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such; second, to require the presence of such parties as are necessary to make an end of the controversy; and, third, to allow otherwise great latitude in respect to the number of parties who may be brought in.”

The equitable interest is, accordingly, with very few and slight exceptions, the grand criterion as to who are, or are not, the necessary or proper parties to a proceeding, of whatever nature: and it is, therefore, indispensable that the doctrine of the former Courts of Chancery in relation to this subject should be carefully studied; without which study, though the practice in ordinary cases may be easily understood, the principles which

govern that practice cannot. Safer guides cannot be taken in this respect than Mr. Edwards' valuable work on Parties, and the 3d and 4th chapters of Story's Commentaries on Equity Pleading; to which, and to the many elementary and other treatises on the same subject, the reader is accordingly referred. The remaining considerations upon it will, therefore, be simply confined to a general definition of the parties who, under the former practice, might or might not sue, or be sued; with a notice in detail of the different provisions of the Code in relation thereto, and of the decided cases with reference to those provisions. The ancient nomenclature of plaintiff and defendant is expressly continued by sec. 70.

This chapter naturally divides itself into two separate and independent branches. First, as to parties plaintiffs, and second, as to parties defendants; which will be accordingly considered *seriatim*.

### § 28. *General Rules as to Parties Plaintiffs.*

With reference to the plaintiffs in an action, the old equitable doctrine still prevails on the following, amongst many other, subjects, which will be found fully treated of in the works before referred to.

*Joint and several Contracts.*—An action upon a joint contract must be brought in the names of all the parties thereto, or in those of the survivors, if the cause of action survive; but if the contract be of a several or severable nature, any of the parties, or the representatives of any who are in the same interest, may sue, either in conjunction or severally, at their election.

*Aliens.*—Aliens in general are competent to sue; but see observations in a previous part of the work as to the jurisdiction of the federal courts.

An alien enemy, whilst he remains such, is not; nor does the statute run against him, sec. 103. A criminal, while under sentence, is in like manner disqualified from suing.

*Corporations.*—Corporations and joint-stock companies may sue or be sued by the names, and under the forms prescribed in the laws authorizing their incorporation. See as to the latter, Laws of 1849, c. 258.

*Heirs and Executors.*.]—In cases where real estate of a deceased party is in question, the heir is the party entitled to sue as to the realty, and the executor or administrator in respect of rents become due, or damages accrued thereto, during the life of the deceased.

In all cases arising out of the personal estate of a deceased party, the executor or administrator is of course the proper party to sue; so also in an action to recover compensation for death by a wrongful act, under laws of 1849, c. 256.

*Joint Wrong.*.]—Where an action is brought in respect of a joint wrong, each party injured must sue separately, except where the injury is one to partners, as such, or the action is for slander of title.

*Principal and Agent.*.]—In all cases of agency, the principal must sue, and not the agent, unless the agent is personally interested, and the former may sue on a contract made for his benefit, though in the agent's own name. *Erickson v. Compton*, 6 How. 471.

*Lunatics, &c.*.]—The committee of a lunatic, idiot, or habitual drunkard, may sue in all cases where he is authorized by statute, see laws of 1845, c. 112, sec. 2; 2 R. S., third edition, p. 115; but, in all other cases where this authority is not expressly given by statute, the action must be brought in the name of the lunatic or idiot, by his next friend, or, it would seem, in the case of an habitual drunkard, by that party himself. See *M'Killip v. M'Killip*, 8 Barb. 552. In *Person v. Warren*, 14 Barb. 488, it was held that a committee might maintain an action in his own name, but for the benefit of the lunatic, for the purpose of setting aside a deed improvidently executed by the latter, not however strictly as committee, but as trustee of an express trust coming within the scope of the enabling provisions in sec. 113. He cannot, however, by any act of his, affirm and sue upon the lunatic's contract, but must first obtain the direction of the court. *Fitzhugh v. Wilcox*, 12 Barb. 235.

Before a committee can sue as such, he must obtain the authority of the court.

Lunatics, idiots, and married women must sue by their next friend, and infants by their guardians, in all cases, except those specially provided for by statute.



*Parents or Masters.*.]—A party standing in either of these capacities may sue in his own name, in respect of an injury to his child or servant, "*per quod servitium amisit.*" He cannot, however, maintain such an action unless he proves some pecuniary loss accrued to him. *Stephenson v. Hall*, 14 Barb. 222. The right of a parent to the custody of his infant children was maintained by the Supreme Court in *The People v. Cooper*, 8 How. 288. The putative father of an illegitimate child has however no right to its custody; that right rests on the contrary with the mother. *Robalinda v. Armstrong*, 15 Barb. 247.

*States.*.]—The State is competent to sue by its proper officer, and foreign states or potentates labor under no disqualification as such.

*Parceners.*.]—Coparceners must sue jointly, except in reference to a partition, but tenants in common may sue either jointly or severally, at their election.

*Limited Partnership.*.]—In cases of limited partnership, under the provisions of Part II. R. S., chap. IV. title I.; 1 R. S. 763 to 768, the acting general partners alone are the proper plaintiffs.

*Ministerial Officers.*.]—Receivers, sheriffs, and all other parties exercising ministerial powers under the special appointment of the courts, in order to the realization of property, or the collection of its proceeds, may sue, as such, in their own names. A similar rule applies, as of course, to public officers specially empowered to sue as such by statute. See *Wright v. Smith*, 13 Barb. 414; *Holmes v. Brown*, 13 Barb. 599; *Fuller v. Fullerton*, 14 Barb. 59.

*Suit in formâ pauperis.*.]—A plaintiff without adequate means, may sue in *formâ pauperis* under the provisions of the Revised Statutes before referred to, and, in this case, he cannot be required to give security for costs: he must however sue as such *ab initio*. *Florence v. Bulkley*, 12 L. O. 28; 1 Duer, 705.

## § 29. Parties Plaintiffs, Rules under Code.

We now come to the different matters, in respect of which

the Code has either altered or defined the previously existing rules upon the subject.

*Real Party in Interest.*—The first provision to be noticed is that in section 113, under which, with the exception of actions by executors or trustees as such, every action must be brought in the name of the real party in interest: establishing, as before stated, the equitable doctrine as to parties, in contradistinction to that formerly prevailing at common law.

It will be seen that, by this section, the old common law doctrine as to a chose in action being incapable of assignment, is done away with, and the assignee is now the proper party, and the only proper party, to sue thereupon, in all cases arising out of contract. See *Combs v. Bateman*, 10 Barb. 573.

The assignee of a portion of an entire demand may maintain an action in the nature of a suit in equity to recover his part; nor will the objection avail as a defence, that others standing in the same position have been satisfied. *Cook v. Genesee Mutual Insurance Company*, 8 How. 514.

By the last amendment of the Code, the assignment of causes of action arising out of tort is prohibited for the future. See *Hodgman v. Western Railroad Corporation*, 7 How. 492; *Merchants' Mutual Insurance Company v. Eaton*, 11 L. O. 140. In the Code of 1849 no such provision was contained, and in *Kellogg v. Church*, 3 C. R. 53, it was held that such a cause was assignable, and that an action might be maintained by the assignee; but of course this proposition is now no longer law. It would seem from the case of *Hall v. Robinson*, 2 Comst. 293, that though a right of action in trover for a chattel is not assignable, a subsequent purchaser of the chattel itself may reclaim, and bring an action to recover it in his own name.

In *The Camden Bank v. Rodgers*, 4 How. 63, 2 C. R. 45, it was held that a bank might sue in its own name, as real holders of a note made payable to their cashier's order, and never regularly endorsed by him. In *Lane v. The Columbus Insurance Company*, 2 C. R. 65, the same principle was carried still further, and, although the policy there in question was effected by an agent in his own name, and with a clause that the loss, if any, was to be paid to him (the agent) "*only*," the principal was, nevertheless, held to be entitled to maintain an action upon it. In *Bos*

v. *Seaman*, 2 C. R. 1, the judge "inclined to the belief" that, notwithstanding these provisions, bonds taken in the name of the people of the State ought still to be so prosecuted, and not in the name of the real party in interest; but this opinion is so doubtfully pronounced, and appears so contrary to the general spirit of the measure, that it can be scarcely considered as of positive authority. In *Hoogland v. Hudson*, however, 8 How. 343, it was held that the same provisions were inapplicable to suits by official persons in their name of office, under special authority conferred by statute, who were there looked upon as trustees of an express trust within the scope of sec. 113.

It will be seen that, by section 112, the rights of the opposite party to interpose any defence, by set-off or otherwise, in respect of a chose in action sued upon by the assignee, are made the subject of express reservation. In the event of any defence of this nature being set up, it would seem that the assignor ought then to be made a party by amendment, in order that the controversy between him and the original defendant may be brought to an issue; though, otherwise, it would be neither necessary nor proper to include him in the action, inasmuch as, under ordinary circumstances, he neither seeks relief himself, nor is relief sought against him. The law, as it previously stood, in respect to the exemption from this restriction of negotiable promissory notes or bills transferred *bonâ fide* and before maturity, is expressly declared at the end of the section.

*Executors.*—By sec. 113, the previous rules with reference to actions by executors or administrators, and trustees of express trusts, are expressly enacted, and they may now sue as before in all cases, without joining their *cestui que trust* in the action. An administrator, it would seem, may sue on a promissory note given for part of his intestate's estate, either personally, or in his representative capacity, at his election. *Bright v. Currie*, 5 Sandf. 433; 10 L. O. 104; *Merritt v. Seaman*, 2 Seld. 168.

*Trustees.*—By the recent amendments, the utmost extent of signification is attributed to the term "trustee of an express trust;" and all parties with whom, or in whose name, a contract is made for the benefit of another, are expressly declared to be included within it. This amendment is in accordance with the views previously laid down in *Grinnell v. Schmidt*, 2 Sandf. 706;

3 C. R. 19; 8 L. O. 197, on the subject of mercantile factors, or agents, doing business for others, but in their own names: and also in *Ward v. Whitney*, 3 Sandf. 399, with reference to the managing owner of a vessel, where another party held a mere executory contract for the purchase of an interest therein. In *Habicht v. Pemberton*, 4 Sandf. 657, the same principle was extended to the case of the general agent of an incorporated association; in *Person v. Warren*, 14 Barb. 488, to the committee of a lunatic, suing to set aside the lunatic's improvident deed; in *Hoogland v. Hudson*, 8 How. 343, to the case of an overseer suing under a filiation bond; and in *Burbank v. Beach*, 15 Barb. 326, to the nominal proprietor of an individual bank. The administrator of a person killed by a steamboat accident, was also held to be the proper party to bring an action under the statute of 1847, on behalf of his widow and next of kin. *Safford v. Drew*, 12 L. O. 150.

The law on the subject of suits brought by the committees of lunatics, &c., in their own names, has been before referred to. Receivers, under sections 244 and 299 of the Code, and Rule 81 of the Supreme Court, and sheriffs, under sec. 232, also possess authority to sue in their own names; though they may likewise sue in the names of the parties for whom they act, or may delegate the right to sue to such parties, and may therefore be considered as coming within the spirit of sec. 113.

It by no means follows, however, that, because parties answering the general description of trustees of an express trust, under the extended signification given to the term by the recent amendments, may sue in their own names, the real parties in interest may not also sue in many of such cases; and, in the event of any conflict between two suits of this nature occurring, proceedings instituted by the latter might, in all probability, obtain the preference. The instance of a party for whose benefit a contract has been made, may be mentioned as a type of numberless cases of this description that might arise in practice. The above-cited cases of *The Camden Bank v. Rodgers*, and *Lane v. The Columbus Insurance Company*, are in fact express authority to this effect.

By the recent statute, c. 224 of Laws of 1854, p. 502, trustees under an assignment by an insolvent corporation, whose trust shall from any cause have become vested in the Supreme Court, are invested with all the power, and made subject to the obli-

gations and duties imposed by art. III., title IV., part III., c. VIII. of the Revised Statutes upon Receivers appointed on the voluntary dissolution of such a corporation, and likewise with those conferred or imposed by the act of 19th March, 1852, to facilitate the collection of debts against corporations, subject in all respects to the control and direction of the court.

*Husband and Wife.*—The next point that arises for consideration is with respect to the interests of married women; the provisions of the Code on which subject are as follows:

§ 114. When a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone.
2. When the action is between herself and her husband, she may sue or be sued alone.

But, where her husband cannot be joined with her, as herein provided, she shall prosecute or defend by her next friend.

The above clause is evidently imperative as to the joinder of the husband as co-plaintiff with the wife, in whatever character she may sue, except under the circumstances specially provided for. As regards her separate property, it is clear that she may sue alone, *Willis v. Underhill*, 6 How. 396; though it would seem she is not absolutely bound to do so. See *infra*.

The last clause in this section was inserted as an amendment in 1851, in consequence of a conflict in the previous decisions on the subject. The conclusion that a married woman could sue or be sued in her own name, under the Code as it stood before, was come to in *Tippel v. Tippel*, 4 How. 346, 3 C. R. 40; *Newman v. Newman*, 3 C. R. 183; *Anon.*, 3 C. R. 18; *Shore v. Shore*, 2 Sandf. 715; 8 L. O. 166, (the same case as the last,) and was acted upon without question in *White v. White*, 4 How. 102: the contrary proposition was maintained in *Coit v. Coit*, 4 How. 232; 2 C. R. 94, affirmed 6 How. 53; *Forrest v. Forrest*, 3 C. R. 254; and *Cook v. Rawdon*, 6 How. 233, 1 C. R. (N. S.) 382. The question is now set at rest by the amendment in question; and the provision has since been acted upon in *Heller v. Heller*, 6 How. 194, 1 C. R. (N. S.) 309; *Meldora v. Meldora*, 4 Sandf. 721; *Henderson v. Easton*, 8 How. 201; and *Towner v. Towner*, 7 How. 387. Her previous consent is of course necessary, before a suit can properly be commenced in her name by a party acting as next friend.

No formal order appointing such party is however necessary. *Towner v. Towner*, above cited.

Where the husband and wife possess different interests in the same subject-matter, they may properly be joined as plaintiffs. *Conde v. Shephard*, 4 How. 75; *Conde v. Nelson*, 2 C. R. 58; *Ingraham v. Baldwin*, 12 Barb. 9, affirmed by the Court of Appeals, 7th Oct., 1853.

In *Van Buren v. Cockburn*, 2 C. R. 63, it was held that the joinder of the husband as co-plaintiff with the wife, in a suit relating to her separate estate, was no ground of demurrer. The contrary is however maintained, and *Van Buren v. Cockburn* expressly dissented from, in *Brownson v. Gifford*, 8 How. 389, where such a demurrer was allowed. See also *Bailey v. Easterly*, 7 How. 495, as to their joinder as defendants. The point seems however very doubtful; where any interest whatever, either present or inchoate, is vested in the husband, it would seem that this strict view cannot prevail. See *Ingraham v. Baldwin*, 12 Barb. 9. See likewise *Howland v. Fort Edward Paper Mill Company*, 8 How. 505; and in all cases of this description it will be clearly proper, and in most cases necessary to make him a defendant, even if he be not joined as plaintiff. In a partition suit by the husband, the wife must be joined as co-plaintiff in respect of her inchoate right of dower. *Ripple v. Gilborn*, 8 How. 456.

The husband's interests, in cases arising before the recent act for the protection of married women, are recognized in *Jones v. Patterson*, 11 Barb. 572, where it was held that he might sue for occupation of his deceased wife's estate during the coverture. In *Moore v. The City of New York*, 4 Sandf. 456, affirmed by the Courts of Appeals, 12th April, 1853, the wife's dower was refused to be allowed as a charge upon lands taken under an act of the Legislature during the husband's lifetime. Goods purchased by the wife were allowed to be taken on execution for the debt of the husband, notwithstanding the statute, in *Lovett v. Robinson*, 7 How. 105. In *Perkins v. Coffrell*, 15 Barb. 446, property originally belonging to and lately re-assigned to the wife, but which had intermediately passed through the husband to his assignees, was held liable to be sold on execution for his debts prior to the re-assignment.

The rights of the wife, on the contrary, as regards the disposal of her separate property by will, are fully maintained in *The*

*American Home Missionary Society v. Wadhams*, 10 Barb. 597. See also as to her rights under an ante-nuptial contract before the statute, *Van Allen v. Humphrey*, 15 Barb. 555, and *Sheldon v. Pelton*, Court of Appeals, 12th April, 1853; in which last case it is held that such a contract, when not fully performed, is no bar to a widow's claim to the property to which she is entitled by statute. She may transfer a note belonging to her as part of her separate property, pending an action for its value, and the transferee may be substituted in her stead by order, whereon her husband will become a competent witness. *Hastings v. McKinley*, Court of Appeals, 7th Oct., 1853. In *Gates v. Brower*, Court of Appeals, 31st Dec., 1853, her right to make a purchase on her own separate account, of farming stock, to be used on a farm occupied by herself and her husband, seems to be recognized, even though it did not appear that she had any separate estate. A new trial was however granted, on the ground that the question of her agency for the husband ought to have been submitted to the jury.

The general rights of a wife under the recent statute, as between herself and her husband, are defined in *Van Sickle v. Van Sickle*, 8 How. 265. Their joint deed, not acknowledged by her, will only avail to pass the husband's interest: on his death she will be restored to all her rights in the premises; nor will even the fact that the consideration for that deed was actually paid to her, estop her claim to the land. *Curtiss v. Follett*, 15 Barb. 337. Nor can she be made liable for her own contract made jointly with her husband. *Marquat v. Marquat*, 7 How. 417; *Bailey v. Easterly*, 7 How. 495.

Her dower right cannot be conveyed by her to her husband, *Graham v. Van Wyck*, 14 Barb. 531; 7 How. 373. Nor can her paramount right to dower be evaded, in a suit by a mortgagee, even though she be made a party to that suit in another capacity. *Denton v. Nanney*, 8 Barb. 618; *Lewis v. Smith*, 11 Barb. 152; affirmed by Court of Appeals, 18th April, 1854. Her claim in this respect will always be favored, nor will she be deprived of it by a testamentary disposition for her benefit, unless the testator's intent to do so appear expressly or by necessary implication. *Lasher v. Lasher*, 13 Barb. 106. See as to the enforcement of her rights in respect of her dower, *Ellicott v. Mosier*, 11 Barb. 574. Nor, it seems, can a set-off be pleaded in an action by her for that purpose. *Bogardus v. Parker*, 7 How. 303.

Where, however, in knowledge of her rights, the widow of a testator had affirmed a contract for sale of specific personal property, made by his executor, and agreed to accept that contract in lieu of her claim, she was held to be bound by its terms, and to be liable to rebate to the purchaser for a deficiency in its subject-matter. *Carter v. Hamilton*, Court of Appeals, 18th April, 1854.

In a gross case of fraud by a married woman, a judgment obtained against her in error, as a *feme sole*, was refused to be set aside on motion, and she was left to her appeal. *Jenet v. Dusenbury*, 11 L. O. 355. In 12 L. O. 31, will be found a long communication on the subject of the rights and powers of married women, in which the subject is fully gone into and various authorities cited.

The principle of the wife's separate interest was, it may be remarked, fully recognized in *Pillow v. Bushnell*, 4 How. 9; 2 C. R. 19; an action brought by husband and wife for an assault on the latter, where evidence of the assault being committed with her consent, was held to be admissible; and that such consent, if proved, constituted an entire defence. See also *Erwin v. Smaller*, 2 Sandf. 340; *Husbrouck v. Vandervoort*, 9 L. O. 249; 4 Sandf. 596; 1 C. R. (N. S.) 81; affirmed by Court of Appeals, 31st Dec., 1853.

It may not be superfluous either to remark at this point, that, in *White v. White*, 4 How. 102, before cited, sec. 2 of the act, c. 200, of the laws of 1848, which gives the wife a separate interest in all property whatever, accruing to her during the coverture, was held to be unconstitutional, as far as regarded its retrospective effect in relation to marriages existing at the time of the passage of that act; but not so as regards its prospective operation.

Although, as a general rule, the appointment of a guardian is a necessary preliminary to the commencement of a suit where an infant is party, see *Hill v. Thaxter*, 3 How. 407; C. R. 3, it seems that where the suit is by husband and wife, in respect of their joint property, the wife being an infant, the appointment of a guardian for the wife will not be necessary. The husband appoints an attorney for both. *Cook v. Rawdon*, 6 How. 233, 1 C. R. (N. S.) 382. See also *Hulbert v. Newell*, 4 How. 93.

*Infants.*—An infant can only sue by his guardian, as above.



It seems, however, that, when a suit is once brought by him, he is as much bound and as little privileged as a plaintiff of full age. A decree for sale of an estate, in which infant plaintiffs were interested, on the prayer of a mortgagee defendant, was accordingly sustained in *Darvin v. Hatfield*, 4 Sandf. 463.

*Joinder of Parties interested.*—By sec. 117, it is enacted that all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be properly joined as plaintiffs, except as otherwise provided. In *Peck v. Elder*, 3 Sandf. 126, it was held, in accordance with this principle, that owners of different tenements affected by the same nuisance, might join as co-plaintiffs in a suit to restrain its continuance. In *Conroy v. Port Henry Iron Company*, 12 Barb. 27, it was similarly laid down, that several creditors of the same debtor might unite in a general creditors' bill, although it was competent for one only to maintain such a suit. Of course, the provision in question must be understood with this qualification, that the persons so to be joined have all the same interest in the subject-matter of the action, and in the relief to be obtained in it. If their rights in relation thereto are in any manner diverse or opposed to each other, they cannot be properly joined as co-plaintiffs, notwithstanding they may all possess, to a certain extent, a common title to relief against some other party. They must, under such circumstances, be classified; and one or other of the classes must appear in the character of defendants, the remaining one undertaking the conduct of the suit. It will be seen that, by sec. 119, the joinder, as plaintiffs, of all parties in the same interest is made positively imperative, unless in the event of their refusal, when, but not otherwise, they may be made defendants.

*Actions on behalf of State.*—The provisions of sec. 447, in reference to actions brought by the proper officer, on forfeiture of property to the people of the State, will of course be remarked.

*Action by One of a Class.*—The old practice of one or more of a numerous class suing for the benefit of the whole, as in the former creditor's suit, and other similar proceedings, is, as will be seen, expressly provided for by the latter part of sec. 119. A party, member of a class of persons interested in a particular

branch of labor, may maintain a suit in his own name, without making the others parties, provided he brings it on behalf of himself, and all others, members of that class. He cannot, however, bring a separate action in his own name only, unless he has an interest in the subject, peculiar to himself, and not enjoyed in common with others. *Smith v. Lockwood*, 13 Barb. 209; 10 L. O. 32; 1 C. R. (N. S.) 319. Nor can any one maintain an action for an injury to others, whether they be individuals or the public, unless his own rights are invaded. *Budeau v. Mead*, 14 Barb. 328. The practice in suits of this description will be found laid down *in extenso*, and various authorities cited, in *Conro v. Port Henry Iron Company*, 12 Barb. 27. In *McKenzie v. L'Amoureux*, 11 Barb. 516, an action, brought by some of the legatees under a will, against the personal representatives and devisees of the testator, was sustained; and it was laid down, firstly, that where the question is one of common and general interest, such an action may be brought, without showing affirmatively the impossibility of bringing in the other parties; and, secondly, that this provision of the Code applies indiscriminately to all actions, whether they involve questions of common interest or not. In relation to the shareholders in a foreign incorporated association, but not incorporated under the laws of this State, see *Habicht v. Pemberton*, 4 Sandf. 657, laying down that, in such cases, the general agent of the society is competent to sue on their behalf under sec. 113, and allowing a demurrer to an action brought by a shareholder on behalf of himself and the other parties entitled. In *Davis v. Garr*, 2 Seld. 124, where a note had been given to the trustees of a similar association and their successors in office, it was held that the individuals named in that note might maintain an action in their own names, though others had succeeded them as trustees.

In *Bouton v. The City of Brooklyn*, however, 15 Barb. 375; 7 How. 198, an action brought by a party complaining of a municipal assessment, on behalf of himself and other landholders, similarly interested, was held not to be maintainable, on the ground that the parties had no common rights in the subject-matter in question, which would authorize them to use that form of remedy.

*Recusant Parties made Defendants.*—Where any party who ought otherwise to have been joined as a plaintiff will not con-

sent, he may be made a defendant, according to the old Chancery practice upon the subject. Sec. 119.

### § 30. *Parties Defendants, General Rules.*

We now come, in the second place, as to who are or are not necessary or proper parties to be made defendants in an action when brought; and many of the general observations before made in reference to parties plaintiffs, are applicable to this branch of the question also.

According to the plan above adopted with reference to parties plaintiffs, it will be sufficient shortly to notice some few of the cases in which the practice still stands as it did before the Code, referring the reader to the works there alluded to, for more detailed information, but entering in detail into the special provisions of the Code on the subject, and the decided cases thereon.

The old doctrine still prevails then on the following points:—

*Joint and Several Contractors.*—Where parties are sued upon a joint contract, or are joint tenants of real estate, all, or the survivors of them, must be made defendants. Thus in *Bridge v. Payson*, 5 Sandf. 210, the nonjoinder of the copartner of a person liable only as a partner, but sued alone, was held to be a valid defence.

Where they are sued on a joint and several contract, the plaintiff may include all, and also the representatives of any deceased, in one action; or may proceed against them separately, at his election. See however sec. 304, as to costs in the latter case.

*Aliens.*—An alien, or a citizen of another State, may be sued in the State courts; but see previous observations as to the federal jurisdiction, when invoked under these circumstances. As long, however, as the former sustains the character of an alien enemy, the statute does not run; sec. 103.

*Corporations.*—Corporations, domestic or foreign, are sued, as before noticed, under their corporate names; and joint-stock companies may be sued in the name of their president or treasurer. See c. 258, Laws of 1849.

Individual corporators cannot be properly joined in a suit against a corporation, see *Pack v. The Mayor of New York*, 3

Comst. 489, unless they have some individual interest which may render them proper parties.

See however *Habicht v. Pemberton*, and *Davis v. Garr*, before cited, in relation to foreign associations, the incorporation of which is not proved, or recognized by the laws of this State.

In *Pack v. The Mayor of New York*, Court of Appeals, 12th April, 1853, and likewise in *Grub v. The Mayor of New York*, Court of Appeals, 18th April, 1854, the Corporation of that city were held not to be liable for damages accrued to an individual, by the negligence of their sub-contractors in executing a public work.

*Shareholders, &c.*]—Shareholders and stockholders in dissolved companies for manufacturing purposes, may be sued, to the amount of their shares, by creditors of those companies, under the provisions of the act of 22d March, 1811. See 3 R. S. 262, Third Edition; see also Laws of 1848, c. 40; 3 R. S., Third Edition, 613; Laws of 1853, c. 333, p. 705. By the latter act, the holders of stock, issued in payment for property purchased, to the amount of the value of that property, and so reported, are exempted from all further liability.

*Representatives of Deceased Debtor.*]—As long as the personality of a deceased debtor remains unexhausted, his executor or administrator is the proper party to be sued, before distribution; but, afterwards, the assets may be pursued in the hands of next of kin, or legatees.

But, after the exhaustion of such personal estate, the real estate may be resorted to, first in the hands of the executor, and afterwards in those of the heir, and, failing, in those of the devisee of such real estate.

In *Stewart v. Kissam*, 11 Barb. 271, the priorities of the parties sued in the above capacities are distinctly laid down, and it was held, 1st, That before a creditor can sue legatees, he must show that no assets have been delivered to or remain with the next of kin. 2d, That before the heirs can be sued, the insufficiency of the personal estate in the hands of the executors, next of kin, and legatees must be shown, and that a suit at law against those parties is a necessary preliminary to the right to sue the heirs; and, 3d, That before devisees can be resorted to, the insufficiency and the exhaustion of all remedies against the prior

parties, must in like manner be shown. It was also held that it makes no difference that the same persons are entitled to the whole estate, real and personal, the statute requiring the creditor in all cases to seek satisfaction from the latter, before he resorts to the former in the hands of the heirs.

In the same case it was held that the heirs, under such circumstances, must all be sued jointly, whether in law or in equity, and also that the heirs and personal representatives cannot be joined in the same suit. This last conclusion seems however to be no longer law, owing to the subsequent amendments in s. 167. In *Kellogg v. Olmsted*, 6 How. 487, it was in like manner held that, under the statute of 1837, Laws of 1837, p. 537, s. 73, the heirs of an intestate must be sued jointly, and cannot be so separately, for a debt against the intestate; but that such liability does not make them liable as joint debtors, within the purview of the statutory provisions in relation to the taking of judgment against parties standing in that capacity, and not served with process. In *Roe v. Swezey*, 10 Barb. 247, the same conclusions as were come to in *Stewart v. Kissam* with respect to the prerequisites to a suit against heirs under these circumstances, are maintained, and it was held that such a suit could not be brought, within the three years' limitation prescribed by the statute, under any circumstances.

*Executors, &c., as such.*—Executors, administrators, or trustees of an express trust, may be sued, as such, without joining their *cestui que trusts*, unless the latter possess some separate individual interest. See, as to residuary legatees, *Shelton v. Pelton*, Court of Appeals, 12th April, 1853, holding that residuary legatees are not necessary or proper parties to a proceeding between the representatives and the widow of a testator, in respect to claims of the latter.

An executor may sue his co-executor for a debt due to the testator's estate. *Wurts v. Jenkins*, 11 Barb. 546.

*Partners.*—In a suit against a partnership, the acting partners are all necessary parties. The reverse is however the case as regards limited or dormant partners, under the provisions of part II. R. S., chap. IV., title I.; 1 R. S. 763 to 768.

*Lunatics, &c.*—An action must be brought against a lunatic, idiot, or habitual drunkard, in his own name, the process being

served as specially provided by sec. 134. The leave of the court must, however, be previously obtained on petition, in all cases where the party has been judicially declared to be such, according to the old practice. *Soverhill v. Dickson*, 5 How. 109; *Hall v. Taylor*, 8 How. 428. The inquisition in such a case is conclusive evidence of incapacity, and evidence to rebut it cannot be given. *Wadsworth v. Sherman*, 14 Barb. 169; affirmed by Court of Appeals, 31st July, 1853. A purchase of real estate from a party, pending the proceedings under a commission issued against him as an habitual drunkard, was set aside in *Griswold v. Miller*, 15 Barb. 520.

*Tenants in Common.*—If tenants in common are sued in respect of matter affecting their joint estate, all must be joined; if on matter relating to their several shares alone, several actions may be brought.

*Ambassadors, Consuls, &c.*—Foreign ambassadors and their servants possess an absolute privilege of exemption from suit in the State courts; and this privilege extends to ambassadors from one foreign sovereign state to another; *Holbrook v. Henderson*, 4 Sandf. 619.

A consul, or vice-consul, possesses a similar privilege, though, so long as he does not assert it, the courts are not absolutely disqualified from entertaining the action. It is, however, competent for him to assert that privilege at any juncture during the proceedings, however late it may be. In cases of any importance, the most prudent course will therefore be, to commence a suit against a party holding this situation, in the federal courts, *ab initio*. The leading case on the subject of this privilege, is that of *Davis v. Puckard*, 7 Peters, 276, (a decision of the Supreme Court of the United States,) which case, if examined, appears to establish beyond question the doctrine that such privilege cannot be waived, but may be asserted at any time, notwithstanding the ruling to the contrary in *Flynn v. Stoughton*, 5 Barb. 115. In *Thompson v. Valarino*, 3 C. R. 143, the doctrine of *Davis v. Puckard* is maintained, and extended to cases where a consul is indebted jointly with a non-privileged party. This case has since been affirmed by the Court of Appeals; *Valarino v. Thompson*, 12th April, 1853; and by it the doctrine above stated is clearly established to its full extent.

In *Re Aycinena*, 1 Sandf. 690; and *Griffin v. Dominguez*, 11

L. O. 285; the same principle is maintained, as regards an attachment in the former, and proceedings supplementary to execution in the latter case.

A foreign state or potentate cannot, it would seem, be sued, unless in the federal tribunals.

*Members of Legislature.*]—A member of the Legislature is privileged from arrest, but no further; and therefore a suit may be commenced or prosecuted against him as usual, in all other respects, except as regards remedies against the person.

*Defendants in Tort.*]—Actions in respect of wrong, jointly committed by several parties, may be brought against all, or against any of those parties individually. Where the same wrong is committed by more than one party severally, as on slander for the same words spoken, separate actions must be brought. Infants may be sued for personal torts, and corporate bodies for damages arising from the neglect of their servants.

Where a married woman is sued for tort, committed before or during coverture, her husband must be joined.

The death of the wrong-doer in actions for personal tort, extinguishes the remedy. In these, "*actio personalis moritur cum personâ*." Where, however, the action really arises out of contract, though formally brought in respect of a wrong, the ordinary rules as to parties apply.

*Principal and Agent.*]—The principal, not the agent, is the proper defendant in all cases, unless, as before remarked, the agent be personally interested.

*Associations owning Vessels.*]—In chap. 385 of the laws of 1836, special provision is made with reference to the parties to be made defendants in actions against associations owning vessels, &c., and a plaintiff is not bound to make persons parties, who have not acquired and duly registered their interest as thereby provided, at least thirty days before suit brought.

*Partition.*]—In partition, every person directly or indirectly interested in the *corpus* of the estate itself must be a party, including the wives of parties living, in respect of their inchoate right to dower. Incumbrancers are not necessary parties, though it may sometimes be expedient to make them so, in order to bind them by the decree. *Bogardus v. Parker*, 7 How. 305. If

done, however, this will be at the risk of costs, see *Hammersley v. Hammersley*, 7 L. O. 127, unless it be done, as there, at the request of the other parties.

The including superfluous parties will not, under ordinary circumstances, constitute a demurrable objection. *Brownson v. Gifford*, 8 How. 389.

*Foreclosure.*—In foreclosure, every person interested in the corpus of the estate, and every junior incumbrancer, whether on mortgage, or as a creditor on a judgment docketed in the same county, must be made a party. Senior incumbrances may be omitted, unless it is sought to pay off their mortgages out of the sale-moneys, in which case they must be joined. And, although they be joined, their paramount rights prior to the incumbrance sought to be enforced, will not be affected, *Lewis v. Smith*, 11 Barb. 151, affirmed by Court of Appeals, 18th April, 1854. The dower right of the wife or widow of the owner is a paramount right of this description, and will render her, as such, a necessary party. See also *Denton v. Nanny*, 8 Barb. 618.

The rights of a party claiming adversely, and prior to the mortgage, cannot properly be litigated in an ordinary suit for foreclosure; and, if he object, the suit should be dismissed against him. *Corning v. Smith*, 2 Seld. 82. In an action for foreclosure of a mechanic's lien, similar principles to the above prevail, both generally, and with reference to prior incumbrances. *Sullivan v. Decker*, 12 L. O. 109. A party plaintiff will equally be bound by the decree in foreclosure, if adverse to any rights he may claim. *Hoyt v. Martense*, 8 How. 196.

*Ejectment.*—In ejectment, the proper defendants now appear to be all persons claiming an adverse title in their own right, or their heirs at law, if deceased, and also the person in actual possession of the premises. See *Waldorph v. Bortle*, 4 How. 358. That the tenant in possession is a necessary party in such an action, is also laid down in *Ellicott v. Mosier*, 11 Barb. 574; *Fosgate v. Herkimer Manufacturing and Hydraulic Company*, 12 Barb. 352. In the latter case it was likewise held that parties claiming an adverse interest to the plaintiffs, though not in possession, might properly be joined under sec. 118, in order to a complete determination of the controversy; but in *Van Buren v. Cockburn*, 14 Barb. 118, it was decided that a person standing



in this last position was not a necessary party. Where, however, defendants were not actually in possession, and never had been, nor received any rents since the plaintiff's interest was acquired, it was held that they were improperly joined. *Van Horne v. Everson*, 13 Barb. 526.

### § 31. *Parties Defendants—Rules under Code.*

We come now to the peculiar provisions of the Code itself, in reference to the parties who may, or ought to be made defendants, and to the decisions thereon.

*Assignee of a Chose in Action.*—Of course the alteration of the previous law with respect to the assignment of choses in action, arising out of contract, is equally applicable to the case of a defendant, as to that of a plaintiff, and such assignee may be sued as well as sue in respect of matter arising thereout.

In *Cook v. Genesee Mutual Insurance Company*, 8 How. 514, it was held that assignees of portions of an entire demand, who had not received their shares, were proper parties in a suit instituted by another standing in the same capacity; but that it would not be necessary to join others who had received their proportions.

*Husband and Wife, Lunatics, &c.*—The husband of a married woman must, as a general rule, be joined as a co-defendant with her in every case, except where the suit is one between themselves as parties. There can be no doubt but that this rule holds good, even when the suit is concerning her separate property, or she is sued in a representative capacity.

Although husband and wife may possess distinct interests in the same subject-matter, the joinder of both in the same action will be no ground of objection. *Conde v. Shephard*, 4 How. 75; 2 C. R. 58. See this subject fully considered in a preceding portion of the chapter.

The same doctrine will of course hold good as respects lunatics or idiots, or habitual drunkards and their committees.

In relation to the necessity of a married woman appearing by her guardian or next friend, see heretofore under the head of Parties Plaintiffs.

*Infants.*—An infant must appear by guardian, and no pro-

ceeding in the suit will be valid until such guardian is appointed, (see *Kellogg v. Klock*, 2 C. R. 28,) but he must be made party in his own name, and the summons served according to the special directions in sec. 134. In *Slocum v. Hooker*, 6 How. 167; 10 L. O. 49, 12 Barb. 563, it was held at special term that, where one of several joint contractors was an infant, he was not a necessary party to a suit on the joint contract, and that he might be disregarded entirely in bringing an action against the firm. This decision has, however, been reversed by the General Term. See 13 Barb. 536. In *Brown v. McCune*, 5 Sandf. 224, it was held that an action could not be maintained against an infant for goods obtained by him during his minority, even though by his own fraudulent representations as to his real age.

*Joint or Several Liabilities.*—By sec. 120, it is declared that, as formerly, in actions against parties severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, all or any of such parties may be included in the same action, at the option of the plaintiff. If, however, he bring separate actions, he does so at the risk of being only allowed one set of costs, under sec. 304. In *Enos v. Thomas*, 4 How. 48, it was held that a contract, with a guaranty signed at its foot, was, for the purposes of an action founded thereon, to be considered as one instrument; and that the party who signed the guaranty there in question, was properly joined as co-defendant with the party to the contract, as it stood before the guaranty was subjoined. See, however, *Brewster v. Sleure*, 11 Barb. 144, to the effect that such a guaranty will not be valid under the Statute of Frauds, unless a consideration be expressed upon its face; and, see the subject of the liability of parties under instruments of this description, hereafter fully considered under the head of Complaint.

*Trustees for Creditors, &c.*—In the *Bank of North America v. Snyden*, 1 C. R. (N. S.) 325, 6 How. 379, it was held that, in an action to set aside an assignment for the benefit of creditors, on the ground of a fraudulent preference given to one of their body, the suit was well brought against the parties to the assignment and the preferred creditors alone, and that the other creditors for whom provision was made were not necessary parties. In such a case the assignee represents all the creditors interested in the trust. His defence is their defence, in the same manner

as an executor represents the estate intrusted to him; and the case of *Grover v. Wakeman*, 4 Paige, 23, and 11 Wendell, 187, is referred to as settling the question.

In *Scudder v. Voorhis*, 5 Sandf. 271, it was held that, in a bill filed to set aside an assignment for the benefit of creditors as fraudulent, it was sufficient to make the trustee a party defendant, without joining the beneficiaries under the trust. See also *Johnson v. Snyder*, 7 How. 395, holding that a trustee appointed by the court in the place of an assignee for the creditors of one of the partners, is a necessary party to an action for taking an account of the partnership estate. In the same case, it was subsequently held that the creditors protected by that assignment were necessary to be brought in. *Johnson v. Snyder*, 8 How. 498.

*Unknown Defendant.*—Where, at the time of commencing the action, the real defendant is unknown, the plaintiff may sue in a fictitious name, amending when the true one is discovered, sec. 175. See *Pindar v. Black*, 4 How. 95.

*Superfluous Parties.*—In *Hull v. Smith*, 8 How. 281, and *Brownson v. Gifford*, 8 How. 389, it was held that the introduction of superfluous parties as defendants, was no ground for demurrer, though of course as a general rule it will be most inexpedient to do so.

*Joinder of Recusant Parties.*—By sec. 119, provision is made for the joinder as defendants of any parties who, in strictness, ought to be plaintiffs, but refuse to be joined as such; a provision analogous in all respects to the rules of the old chancery practice.

*Defendant for a Class.*—Under the same section, power is given for one or more defendants of a class to defend for the benefit of the whole, where that class is very numerous, or it may be impracticable to bring all the parties composing it before the court; except, however, under very unusual circumstances, it would scarcely be prudent to omit joining every party really interested in the first instance.

*Defendants necessary in certain cases.*—In *Niles v. Randall*, 2 C. R. 31, it was held, that, in an action to set aside a mortgage as usurious, brought against an assignee of that mortgage, the original mortgagee was properly made a defendant. N.B.—The

Reporter's head note is the direct reverse of the statement in the body of the report.

Where, too, the plaintiff in a judgment creditor's suit attempted to reach moneys due on a mortgage, alleged to be fraudulently assigned, it was held that the assignee of that mortgage must be made a party, though he resided out of the State. *Gray v. Schenck*, 4 Comst. 460.

In *Kidd v. Dennison*, 6 Barb. 9, it was held that the vendee of an estate was a necessary party to a bill filed by the vendor, to stay waste on the premises, pending the contract for sale, and before its completion.

In an action brought by the receiver under a creditor's bill, to reach property in the hands of the trustees of a judgment debtor, the latter was held to be a necessary party. *Vanderpool v. Van Valkenburgh*, 2 Seld. 190.

In an action against the owner of property, under the Mechanics' Lien Law, brought by a sub-contractor, the contractor is a necessary party, and, on application, will be ordered to be brought in. *Sullivan v. Decker*, 12 L. O. 109. The former chancery practice on this subject, as referred to in the outset of the chapter, may advantageously be consulted.

### § 31. *Bringing in of Parties, Necessary Defendants.*

The first provision on this subject is made by sec. 118, by which the fullest latitude is given for the bringing in as defendants, of any persons having or claiming interests adverse to those of plaintiffs, or who may be necessary parties to a complete determination and settlement of the questions involved in the cause; though, of course, any plaintiff joining persons as defendants, whose interests in the matter in controversy are doubtful, does so at the risk of having to pay the costs of such parties, in case it shall be decided that they were unnecessarily brought in. See *Hammersley v. Hammersley*, 7 L. O. 127.

*General Power as to Parties.*—By section 122, however, the court is invested with the fullest discretionary authority in relation to the parties to a proceeding, generally considered, without reference to the capacities in which they may stand, or their actual joinder in the previous proceedings.

The provision in question, which in its present form forms part of the amendments of 1851, runs as follows:

§ 122. The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

The first clause in this section was in the Code of 1849, and is little more than declaratory of the inherent powers of the courts, acting as courts of equity, to enforce the bringing in of all proper parties, in relation to the controversies brought before them. The substitution of the word "must" for the word "may," in the last words of that clause, is, however, important, and seems to leave them no discretion in this respect, in cases where any party claiming a really adverse interest has been omitted to be brought in. In *Wallace v. Eaton*, 5 How. 99, 3 C. R. 161, it was held that this is the controlling section in cases of a demurrer for want of proper parties. The next clause, the first of those brought in by the amendment of 1851, enables persons, not parties to suits for the recovery of property, but having an interest therein, to apply, themselves, to the court, for the purpose of being brought in by amendment, without waiting for the action of the original parties thereto; an important and novel provision.

In *Fraser v. Greenhill*, 3 C. R. 172, it was held that, where an attachment has been issued against a debtor's property under the Code, any other creditors of that debtor may not only be proper parties to the suit, but may apply to the court for the purpose of being brought in as such. In *Judd v. Young*, however, 7 How. 79, a similar application by subsequent creditors claiming an interest in surplus moneys under a prior foreclosure was refused, on the ground that the provisions of sec. 122, under which the application was made, were confined to actions for the recovery of specific real or personal property, and to them alone; and this seems to be the sounder view, for it would indeed be a great hardship to a creditor, to have his proceedings embarrassed by the presence of persons who are entire strangers to the main subject of the suit, and whose only claim can be in respect of a

surplus, which cannot arise until after the satisfaction of his debt, and in which he has therefore no interest whatever.

### § 32. *Interpleader.*

The following provisions on this subject are also contained in s. 122, above cited, and were first inserted in 1851.

A defendant, against whom an action is pending upon a contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person, not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

This amendment was doubtless suggested by the English statute 1 and 2 William IV., c. 58, on the same subject.

In *Van Buskirk v. Roy*, 8 How. 425, this remedy was extended to a defendant who held, as administrator, a promissory note, the title to which was disputed by two parties. In *Chamberlain v. O'Connor*, 8 How. 45, it was held that this remedy is inapplicable to proceedings under the mechanics' lien act. Except these two decisions, the recent reports are silent upon the subject; and until the proper construction of this provision shall have been laid down more in detail, the English books of practice may advantageously be consulted upon the question. It will be observed that the powers of the court upon this subject are entirely discretionary, and that the relief so asked can only be asked as a matter of favor, and not of right. The operation of the court, too, is confined to actions *ex contractu*, or for the recovery of specific real or personal property. The party applying must prove entire good faith on his part, and entire absence of collusion with the party proposed to be substituted in his place; and he must also place the subject-matter of controversy within the control of the court, entirely and without reserve. Under these circumstances, and under these only, can the application be made; and a failure in any one of these requisites will, of course, be fatal to it, and would probably involve

the payment of costs. If it succeed, however, the applicant obtains a complete release from the controversy and its consequences, and the substituted party takes his place in all respects.

Of course this remedy is entirely inapplicable to cases where the party seeking it retains any claim or interest whatever in the subject-matter of the controversy, or is in reality directly liable, as in the case of an advertised reward claimed by several, or in those where he has otherwise given occasion for that controversy by his own acts. It is simply and solely intended to meet the case of a mere depositary, or holder of that subject-matter, in an official, ministerial, or fiduciary capacity, either original, or attaching by implication, under occurrences accruing subsequent to its original coming into his possession. A party into whose hands money or goods may have come in the ordinary course of business, for safe custody, and to be thereafter accounted for to the proper owners, may also become entitled to this remedy; and it would seem, from some of the English cases, that the existence of a mere lien upon such goods, for charges in respect of such custody, which lien does not in its nature attach specially on either of the claimants, and involves no assertion of ownership in any part thereof, will not be a bar to such an application; though any claim of actual ownership, or litigation in respect thereof, in any part of such deposit, however small, will be held to be so. A purchaser of land, unable to pay his purchase-money to one or other of two parties claiming title to the estate contracted to be sold, has also been held in England to be a proper subject for this species of relief. Any dealing with either of the parties, calculated to alter their interest in the subject-matter in question, or to give either of those parties an independent right against the depositary, the taking of any indemnity from either, or any illegality in the original transaction, out of which the deposit arose, will of course do away with the *bona fides* of the application, and form an effectual bar to it, as showing collusion. The reverse, however, seems to be the case with regard to a mere demand of indemnity, prior to the action, when not complied with. It is evident that no remedy of this kind exists before action brought; and, of course, if the party prefer to institute a separate suit for the same purpose, it is competent for him to do so, though probably at the risk of costs, if such separate suit prove to be clearly unnecessary.

The proper mode of applying for this species of relief, or that last previously mentioned, would appear, by analogy, to be by motion, founded on a duly verified petition. The latter appears to be advisable, if not necessary, inasmuch as either of such applications must, of necessity, be grounded upon a substantive statement of facts, unconnected with the matter regularly in question in the cause; and it is of course necessary that such statement should be duly brought before the court, and should duly appear upon the face of the order granted upon it, or rather upon the petition, as, in effect, part of the order,—so that the circumstances under which the court has exercised its discretion in the matter may be duly apparent upon the record.

### *Concluding Remarks.*

The subject of abatement of suits, and the measures necessary thereon, will be found considered hereafter in that portion of the work which treats of the proceedings intermediate between the original joinder of issue and its trial.

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## CHAPTER III.

### OF THE LIMITATION OF ACTIONS.

#### § 33. *Limitations, generally considered.*

THIS subject, as was the case with the last, divides itself naturally, in the first instance, into two branches, involving the consideration of the limitation of actions, as applicable,—1stly, with reference to real, and 2dly, to personal property. These two different subjects will accordingly be treated of successively in the above order; the preliminary provision of the Code, abolishing the former law thereon, being previously noticed; a few supplementary observations, applicable to the limitation of actions in general, being subjoined at the conclusion of the chapter.

The provisions of the Code on these subjects are contained in the second title of part II. of that measure, and consist of four chapters. The three last of these follow the order above pre-



scribed; the first being of a general and preliminary nature, and containing only two sections.

By section 73, the first of those last alluded to, the whole of the provisions of that chapter of the Revised Statutes which contains the general statute law on this subject, are expressly repealed; so that, in relation to all future controversies, the Code, and the Code alone, will henceforth be authority.

As to actions commenced, or rights accrued previously to its passage, the old law still governs. See *Waddel v. Elmendorf*, 12 Barb. 585, affirmed by the Court of Appeals, 18th April, 1854, holding a similar doctrine with reference to a judgment recovered prior to the passing of the Revised Statutes. See also *Clark v. Bard*, Court of Appeals, 31st December, 1853; *Henderson v. Cairns*, 14 Barb. 15; and likewise, as to the doctrine of adverse possession, *Poor v. Horton*, 15 Barb. 485; *Fosgate v. Herkimer Manufacturing and Hydraulic Company*, 9 Barb. 287.

Where, however, a previous right of action stood already barred at the actual time of that passage, it was held that a subsequent parol acknowledgment of that right, though sufficient to have revived it under the former statutes, had no such effect; the Code being in actual operation at the time such acknowledgment took place, and the provisions of section 90 being applicable accordingly, without attributing to those provisions any retrospective effect whatsoever. The alleged verbal promise was a transaction subsequent to the passage of the Code, and was, as such, governed by the statute law in existence at the time of its actual making. *Wadsworth v. Thomas*, 7 Barb. 445; 3 C. R. 227.

The other introductory section, (74,) after general provisions in relation to the following limitations, contains a further general reservation of all other cases in which a special limitation is prescribed by statute, independent of the provisions repealed as above, which special limitations will be treated of as they occur.

An important provision has been added at the conclusion of this section, on the amendment of the measure in 1851, *i.e.*, that objections of this nature can only be taken by answer. No restriction in this respect was imposed by the Codes either of 1848 or 1849; and in *Fellers v. Lee*, 2 Barb. 488, it was treated as a well-settled rule, that, when actually apparent on the face of the complaint, demurrer would lie on this ground.

In reference to limitations in general, it may be remarked that

so long as a right remains suspended and vested in no one, the operation of the statute is suspended also. Thus, in a case where an action was brought by an administrator, in respect of property received after the intestate's death, but before administration taken out, it was held that the statute did not commence running until the latter date. *Bucklin v. Ford*, 5 Barb. 393.

In *Carroll v. Carroll*, 11 Barb. 293, where an executor had held himself out to devisees, as engaged in winding up the testator's estate, and discharging prior claims, it was decided that whilst he was doing or professing to do this, the statute would not run in his favor, and that each act of his in the administration of the estate was effectual as an acknowledgment of his continuous acting as executor. A surrogate's decree, however, directing a *pro rata* payment of a debt, does not, *per se*, amount to a promise on the part of an administratrix to pay the balance, so as to deprive her of the benefit of the statute, *Arnold v. Downing*, 11 Barb. 554; nor does a devise by a testator for the payment of debts generally, prevent the statute from running as against debts due prior to his decease. *Martin v. Gage*, Court of Appeals, 31st Dec., 1853.

### § 34. *Real Estate, Limitations as to.*

We now arrive at the consideration of the limitations imposed on actions for the recovery of real property, as contained in chap. II. of the title in question.

*Actions by People.*—The first subject entered upon is that of actions by the people of this State, or their grantees.

The limits imposed in this respect are as follows, viz.: that the people or their grantees cannot sue in respect of real property, by reason of the title of the former, unless,

1. Such right have accrued within forty years previous to action, or other proceeding for its assertion; or

2. Unless the people, or those from whom they claim, shall have received the rents and profits of such real property, or some part thereof, within the same period; Code, sec. 75: and by sec. 76, the same limitation is imposed upon grantees of the people, claiming under their grants. By section 77, this period of limitation, in the case there provided for, is shortened by one half, and twenty years only are allowed for bringing actions by

the people, or their grantees, in cases where a recovery is sought of lands previously granted, but the grants of which have been revoked, on the ground of fraud or of defective title.

In interpreting these sections, however, the right of eminent domain, by virtue of which the people are the unquestioned owners of all waste and unoccupied lands within the State, must not be overlooked, or a most serious mistake may be committed. Extensive as the words of the above limitations may seem, in practice they only apply to cases where there has been positive adverse possession (actual and not constructive, and capable of distinct proof) of the whole matter in controversy, during the whole of the period of limitation. The *onus probandi* in such cases lies, moreover, upon the defendant, who must plead the facts, or show an adverse title in himself by special allegation. A mere averment, that no right has accrued to the people within forty years, &c., following the words of the above section, was held in *The People v. Van Rensselaer*, 8 Barb. 189, to be insufficient, and a demurrer on that ground was allowed; but see below as to reversal of this decision.

This decision is also so far overruled by the case of *The People v. Arnold*, 4 Comst. 508, where an answer, following the exact words of the statute, was held to be good, as pleading the facts of the case, and not the evidence in support. It was held, however, that, on the trial itself, an unquestionable and actual adverse possession must be shown.

In *The People v. Van Rensselaer*, above cited, the rule that, in such cases, every presumption is to be made on behalf of the people, and against parties claiming in opposition to them; and that the mere fact of lands having been actually unoccupied, is of itself sufficient to show a *prima facie* title on their part, unless rebutted by distinct evidence of actual adverse possession, or of adverse documentary title, is laid down in the most unequivocal terms, and to the fullest extent of the high prerogative doctrines held in the older English cases upon similar subjects. See however *The People v. Clarke*, below cited; and the decision in *The People v. Van Rensselaer* has since been reversed by the Court of Appeals, 31st Dec. 1853.

In *The People v. Livingston*, 8 Barb. 253, similar principles are also most distinctly and most unequivocally asserted, though, under the peculiar circumstances of that case, the *prima facie* title of the people, as above alluded to, was rebutted by proof

of an old grant from the English crown, under which, title to the waste lands there sought to be recovered, had been originally conferred upon the parties claiming to hold them.

In *The People v. Clarke*, 10 Barb. 120, affirmed by the Court of Appeals, 31st Dec. 1853, an action on behalf of the people was dismissed, on the ground of the defendant's title being derived under a similar grant; and it was held that the same rules with respect to adverse possession should be applied to an action between the people and a citizen, as between one citizen and another, provided such possession be continued for the full statutory period.

The dispositions of the Legislature upon this particular subject are evidenced by the resolution of 10th April, 1848, see Laws of 1848, page 582, expressly directing the Attorney-General to impeach all manorial titles throughout the State, wherever it may be found practicable; and by the provisions of c. 128 of the Laws of 1850, declaring that proceedings so instituted by him, shall have precedence over all others. The above cases go far, however, to neutralize any evil effect that might attend too rigid a compliance with these directions.

*Actions by Private Parties. Adverse Possession.*—The period of limitation in ordinary real estate cases, is fixed by sections 78 and 79 at twenty years, as under the Revised Statutes; within which period, the party prosecuting or defending a claim to or in respect of real property, must show seizin in himself or his ancestor, predecessor, or grantor; whilst, by section 80, a bare entry is declared insufficient to establish, or to strengthen a claim, unless an action be commenced thereon within one year after, and also within the period above prescribed.

Mere possession of the property, not adverse to the right of a claimant, is, under section 81, to be deemed subordinate to the legal title: and, in every action, the person establishing such legal title is to be presumed to have been duly possessed, unless the contrary be shown. Under sec. 86, the possession of a tenant, at any time, is to be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy, or the last payment of rent; whilst, by sec. 87, it is expressly declared that no right to property shall be affected, by reason of a descent being cast, by the death of the person in actual possession.

The doctrine of adverse possession is defined by the chapter now under consideration, as follows, *i. e.*

Where it shall appear that the occupant, or his predecessors in title, entered into possession of premises under claim of title, exclusive of any other right founded upon a written conveyance, or upon the decree of a competent court, and that there has been a continued possession of such premises, or of part of them, under such claim, for twenty years, such possession shall be deemed adverse. And such adverse possession shall extend to the whole property, of which a part has been so held, except where that property shall consist of a tract divided into lots, in which latter case, the possession of one lot shall not be deemed that of another of the same tract.—Sec. 82.

By sec. 83, the premises comprised within the scope of an adverse possession of this nature are defined to be as follows, viz:

1. All land usually cultivated and improved.
2. All land protected by a substantial enclosure.
3. All unenclosed land used for the supply of fuel or fencing timber.
4. Any portions of a partially improved farm or lot, left un-cleared or unenclosed, according to the usual course or custom of the neighboring country.

An inferior species of adverse possession may also, under sec. 84, be acquired by actual continued occupation, under a claim of title, exclusive of any other right, but not founded either on a written instrument, or on the decree of a court.

Adverse possession of this nature extends, however, only to land which has been actually occupied by the party claiming such title; and, by sec. 85, such actual occupation is defined as extending to the two following cases, and to those only, *i. e.*:

1. Where the land has been protected by a substantial enclosure.
2. Where it has been usually cultivated or improved.

Possession of this nature confers, therefore, no such rights with regard to unenclosed land, as are claimable under title founded upon a written instrument, or the decree of a court, as before stated. Under sec. 86, adverse possession can in no case be established by a party who has once stood in the relation of tenant to the claimant, or his predecessors in claim, until the full period of limitation shall have expired since the termi-

nation of his lease, or the time of the last payment of rent under his tenancy, where no lease shall have existed.

In *Miller v. Garlock*, 8 Barb. 153, it was held that the continuous and uninterrupted user of an easement for twenty years, under a claim of right, was an adverse enjoyment sufficient to raise the presumption of a grant, as against the owners of the lands affected by it; and that the right to an easement thus acquired could only be lost by non-user of twenty years, (especially if coupled with acts of such owners inconsistent with the right,) or by a release.

In *Smith v. McAllister*, 14 Barb. 434, it was in like manner held that acquiescence in an erroneous boundary line for a length of time sufficient to bar an entry, was sufficient to raise the presumption of an agreement, and to defeat an ejectment on the part of the adjoining owner.

A similar conclusion was come to in *Hamilton v. White*, 1 Seld. 9, where a right of way originally enjoyed by the defendants, had been closed by the plaintiff, and another road opened in its stead. The substituted way having been closed by him, it was held that he was bound to restore the former one, and that the defendants were not trespassers on the substituted road, until the old one was restored to its former condition.

In *Lane v. Gould*, 10 Barb. 254, the nature of adverse possession with reference to open and unenclosed woodlands is defined *in extenso*. The possession there claimed was not continuous as to any specified portion of the property, but consisted in taking wood at various times, and in occasionally enclosing and cultivating small portions for a single season. It was held that this species of enjoyment was not sufficient to constitute a title, and that, to make out an adverse possession, where there is no deed, there must be a real substantial enclosure, a "*pedis possessio*," or an usual cultivation or improvement of the premises, continued for a sufficient length of time, and accompanied throughout by a claim of title. It is not necessary that this occupancy should be under a rightful title, but it must be marked by definite boundaries, and continued for a sufficient period. See also on these points, *Poor v. Horton*, below cited. It was also held with reference to a claim under a deed, that the only effect of a paper title was to enlarge and extend the possession so as to include the entire lot described; but that, if the instrument claimed under contain no certain and ascertainable description,

it cannot have the effect of extending the possession beyond the "*pedis possessio*," which is definite, positive, and notorious.

In *Poor v. Horton*, 15 Barb. 485, it was held that where an entry had been made on wild lands, but not proved by whom, "the presumption was that such entry was permissive and not in hostility to the true title." It was also held, that an ejectment for uncultivated lands might be maintained without actual entry, and likewise, that an adverse claimant in possession may legally abandon or release his rights, and will be concluded by his acts in this respect. See also on this last point *Lindner v. Snyder*, 15 Barb. 621.

In *Vrooman v. Shepherd*, 14 Barb. 441, it was held that a release could not properly be executed by a tenant by the curtesy to the heir, when both were out of possession. The possession of a vendee under a contract may be adverse as against strangers, but cannot become so to his vendor, until after performance in full by him; if, however, there has been such full performance, a conveyance may be presumed, the vendee still remaining in possession; and it seems that if, in the absence of all proof on the subject, the latter continues in undisturbed possession, performance by him may be presumed, after the lapse of twenty years from the time when he should have performed.

If the grantee in fee enter in the lifetime of the grantor, and hold both lands and deed, for a period sufficient, if adverse, to bar an entry, in the absence of other evidence, the character of his possession may be ascertained from the language of the deed, and, if that professes to convey an estate in fee, the inference that both entry and possession were adverse will be irresistible; *Corwin v. Corwin*, 9 Barb. 219; so held by a majority of the court at general term, *Barculo, J.*, dissenting.

The facts constituting an adverse occupation must be specifically alleged, or it will be no defense. As against a reversioner there cannot be an adverse possession; it can only exist as against a person entitled at the time. *Clarke v. Hughes*, 13 Barb. 147.

It seems that the people and private individuals are placed on the same footing with regard to the facts, which will, or will not constitute an adverse possession, as against them respectively. See the *People v. Clarke*, above cited.

*Disabilities.*—Lastly, by sec. 88, the disabilities which suspend

the operation of the statute in real estate cases are thus defined, i. e. :—

If, at the time that the title to real property shall descend or accrue to any person, that person shall be—

1. A minor.
2. Insane.
3. Imprisoned on a criminal charge, or on execution, upon conviction of a crime, for a term less than for life; or,
4. A married woman.

The operation of the statute is, in all these cases, to be suspended until ten years after such disability shall cease, or after the death of the person under such disability.

The provisions of sec. 100, in reference to the absence from the State of parties against whom a cause of action shall accrue, seem also applicable to real estate cases, though included in another chapter of the Code. The subject will be more fully entered upon in the subsequent division of this chapter.

The periods of disability above cited are the same as those under the former law; though the Old Rules on this subject, with reference to actions arising in respect of personal property, have undergone a considerable change, as will be seen hereafter. In fact, as regards real estate actions in general, no change of any moment has been made in the former law upon the subject.

In *Roe v. Swezey*, 10 Barb. 247, it was held that a suit, having directly or indirectly the effect of charging real estate in the hands of heirs with the debt of their ancestor, could not, under any circumstances, be commenced within the three years' limitation fixed by statute, 2 R. S. 46; even though that suit sought to deprive them of that character, and to render them liable as purchasers under a deed of trust.

### § 35. *Personal Actions, Limitations as to.*

The statutory provisions fixing the periods of limitation in actions other than for the recovery of real property, are thus fixed by Chapter III. of that portion of the Code now under consideration :

*Judgments and Sealed Instruments.*.]—The first period of limitation fixed, is with reference to actions,



1. Upon a judgment or decree of any court of the United States, or of any State or Territory within them; or,

2. Upon a sealed instrument:

Which, by sec. 90, are fixed at twenty years in each case; and that by way of positive limitation, and not as a presumption of payment, as the law before stood under the provisions of the Revised Statutes repealed as above. See as to the law under these provisions, before their repeal, *Carll v. Hart*, 15 Barb. 565.

The former law on the subject of pleading a presumption of this nature, as declared in *Austin v. Tompkins*, 3 Sandf. 22, is therefore become obsolete; but, nevertheless, the principle laid down in that case, i. e., that where a judgment has been taken against executors, for assets "*quando acciderint*," that judgment will still remain in force, and the parties holding it may enforce it at any time as against assets subsequently accrued, at however late a period, may probably be held to be still existent, even under the present more positive limitation.

The words of the statute seem large enough to include the judgments of courts not of record; but the doctrine that a judgment of this nature is only a mere contract, and is suable upon, and subject to limitation as such, would appear to have prevailed, in analogy to the provisions of the Revised Statutes in relation thereto. See on this point in *Re Delacroix*, 1 Bradford's Surrogates' Reports 1, as to a Surrogate's decree; and *Maguire v. Gallagher*, 2 Sandf. 402; 1 C. R. 127, as to justices' judgments.

Where, however, the lien of a judgment on real estate has ceased by lapse of time, the court will interfere as regards the rights of *bona fide* purchasers thereof, and will grant a perpetual stay of execution, so far as their interests are concerned. *Wilson v. Smith*, 2 C. R. 18.

*Six Years.*—The period of limitation of actions generally considered, including suits for relief on the ground of fraud, remains, as before, six years; and the actions falling within that limitation are thus defined by sec. 91 of the Code:

§ 91. Within six years.

1. An action upon a contract, obligation, or liability, express or implied; excepting those mentioned in section 90.

2. An action upon a liability created by statute, other than a penalty or forfeiture

3. An action for trespass upon real property.

4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief, on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party, of the facts constituting the fraud.

In actions on contract, where credit has been given by special stipulation, the operation of the statute will date from the period of the expiration of the credit so given, without regard to the date of the original transaction. In those for an injury, or for statutory penalties, the time will run from the actual commission of the offence sued upon, or by which the penalty was incurred.

The point as to actions on the judgments of courts not of record, as supposed to fall under the class of actions on contract, under subdivision 1 of the above section, has been before adverted to.

In *Corning v. M'Cullough*, 1 Comst. 47, a suit against a stockholder of a corporation, pursuant to its act of incorporation, with a view to charge him individually with payment of a debt, was held not to be an action for a penalty, under subdivision 2 of sec. 92, but to fall within subdivision No. 2 of the above provisions.

In cases of trover, the statute was held to run from the actual conversion of the property, without regard to the time of demand and refusal, in *Kelsey v. Griswold*, 6 Barb. 436.

In *Schroepfel v. Corning*, 10 Barb. 576, affirmed by the Court of Appeals, 2 Seld. 107, it was held that, in an action brought to set aside an assignment of securities made as part of an usurious transaction, the statute will commence running from the date of that assignment, both as regards the assignment itself, and also as to any moneys paid under it: Paige and Foote, J.J., dissenting from the latter conclusion, and holding that the receipt of such moneys created a new cause of action.

In *Sears v. Shafer*, 2 Seld. 268, the rule as to subdivision 6 is laid down as follows: The statute does not constitute a defence to a suit in equity to set aside a deed on the ground of fraud,

unless it be shown that the plaintiffs discovered the facts constituting that fraud more than six years before the filing of the bill; nor unless that defence has been set forth by the defendants in their answer.

In *Mayne v. Griswold*, 3 Sandf. 463, the rule as to the operation of the statute under these circumstances, was held to be general, and to apply in all cases of that nature, whether exclusively cognizable in equity, or the reverse; and it would seem that the complaint, in such cases, ought to go on to show, not merely that the fraud has only been discovered within six years, but that, with reasonable diligence, it could not have been discovered sooner.

In *Baird v. Walker*, 12 Barb. 298, 1 C. R. (N. S.) 329, it was held that where goods have been left with a factor for sale by commission, the owner has no cause of action for the price of such goods received by him, until a demand and refusal to pay, the same; and that the statute of limitations does not commence to run until such demand has been made.

The general principle of limitation of personal actions having thus been laid down, the following special exemptions are made from its operation:

*Three Years.*]—A period of three years is prescribed by sec. 92, in the following cases:

§ 92. Within three years.

1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this State, except where the statute imposing it prescribes a different limitation.

In *The People v. Wood*, 10 L. O. 61, where the defendant was indicted for obtaining money under false pretences, under 2 R. S. 607, which prescribes that the indictment shall be found and filed within three years after the commission of the offence, it was held that the day on which the act is done must be included in the computation: and the indictment, on 7th November

1851, for an offence committed 7th November, 1848, was quashed, as barred by the statute above cited.

With reference to subdivision 2 of this last section, see *Corning v. McCullough*, above cited.

*Two Years.*]—A two years' limitation is then fixed as follows, by sec. 93 :

§ 93. Within two years.

1. An action for libel, slander, assault, battery, or false imprisonment.
2. An action upon a statute for a forfeiture or penalty to the people of this State.

These periods are in many respects materially reduced from those allowed by the Revised Statutes, with the single exception of slander. The former periods were four years, in assault, battery, and false imprisonment, and six in libel.

*One Year.*]—A one-year limitation is prescribed by sec. 94, with reference to actions against a sheriff or other officer for an escape, in connection with which, it may be observed that the subsequent death of an escaped prisoner, before action brought, is no discharge of such liability. See *Tanner v. Hallenbeck*, 4 How. 297.

A peculiar limitation is fixed by section 96, in respect of actions upon a statute for a penalty or forfeiture, given in whole, or in part, to the prosecutor. Such actions must be commenced by the latter within one year after the commission of the offence. If not, his power to sue is gone, but a further period of two years is allowed, during which such action may be commenced on the part of the people, by the proper officer.

In *Schroepfel v. Corning*, 10 Barb. 576, affirmed by the Court of Appeals, 2 Seld. 107, it was held that the last-mentioned limitation only applies to cases where money is actually paid for excess of usury, and not to a suit brought to set aside an assignment of securities for similar purposes, or for moneys received under such assignment. Under these circumstances, the usual statutory period of six years is applicable.

*Ten Years.*]—Lastly, the period of limitation in all other actions for relief whatsoever, not therein-before provided for, is fixed, by section 97, at ten years after the cause of action shall have accrued. Under this large class will fall the whole of that description of controversies which were formerly peculiarly of

equitable cognizance, including all those for the purpose of enforcing any securities or liens upon real estate, not involving the actual title thereto. See *Elwood v. Deifendorf*, 5 Barb. 398; *Mann v. Fairchild*, 14 Barb. 548.

The special limitation as to actions for relief on the ground of fraud, above noticed, must however be borne in mind with reference to suits of this description.

An administrator, who neglected to prove his debt against the estate of the intestate for ten years and upwards, was held to have lost his claim, and to be barred under this section of the statute. *Re Rogers' Administrator*, 11 L. O. 245.

*Personal Actions by People.*]—The people of the State enjoy no such peculiar privileges, in respect to personal demands, as are before accorded to them in reference to real estate; they are, in these cases, subject in all respects to the same rules as bind private parties. See Code, sec. 98.

*Actions on Judgments.*]—Before passing on to the subject of limitations in general, the following special provisions, in addition to the above, may be noticed:

Actions upon judgments of any court of this State, except a court of a justice of the peace, are positively prohibited by sec. 71, unless upon leave of the court, for good cause shown, on notice to the adverse party; and actions upon judgments of a justice of the peace cannot be brought in the same county, within five years after their rendition, except under the following circumstances:

1. The death, resignation, incapacity to act, or removal from the county, of the justice himself.
2. The absence of personal service of process on the defendant, or all the defendants.
3. The death of some of the parties.
4. The loss or destruction of the docket of the judgment.

But it would seem that the plaintiff is always at liberty to bring an action thereon, in any other county, within that period.

In *Smith v. Jones*, 2 C. R. 78, the above limitation, in reference to actions on justices' judgments, was applied by the county judge to the pleading of such a judgment, as a set-off, within the same period; and it was held that a judgment could not be so pleaded, within five years after its rendition.

A conflict of opinion has arisen, between the Superior Court and the Court of Common Pleas, in reference to actions in assistant justices' courts. In *McGuire v. Gallagher*, 2 Sandf. 402, 1 C. R. 127, it was considered that they came under the definition of justices' courts; but in *Mills v. Winslow*, 3 C. R. 44, it was held, on the contrary, they did not; and that actions on the judgments of the assistant justices' and Marine Court in New York, fall under the general class of judgments, and that actions may be brought on them at any time, on leave of the court first obtained. See, also, *Jackson v. Wheeldon*, 3 C. R. 186, before cited. The Common Pleas being now the peculiar court for the revision of justices' judgments, the doctrine laid down by them will probably prevail. In *Quick v. Keeler*, 2 Sandf. 231, and *Dunham v. Nicholson*, 2 Sandf. 636, it was held that, when an execution had been returned unsatisfied prior to the Code, an action in the nature of the former creditors' suit might be maintained on the judgment on which it was issued, without previous leave of the court; on the ground that, though assuming the form of an action, it was in reality a proceeding to carry out the existing judgment, and to aid the process issued upon it.

*Claims against Executors, &c.*—A special limitation is also prescribed by the Revised Statutes, 2 R. S. 89, sec. 38, in reference to claims presented to an executor or administrator, and disputed or rejected by him; an action on which must, of necessity, be commenced within six months after such dispute or rejection, if the debt be then due; or, if not, then within six months after the same, or any part thereof, shall have become so, or the right to bring such action will be barred.

*Defence after Service by Publication.*—A peculiar limitation is imposed by sec. 135 of the Code, in reference to proceedings for the purpose of being let in to defend an action, where judgment has been entered up on service by publication; seven years being fixed as the period allowed for that purpose.

*Actions on Bank Notes, &c.*—By section 108, actions to enforce the payment of bills, &c., issued by moneyed corporations, or issued or put in circulation as money, may be commenced at any time without any limitation whatever.

### § 36. *Suspension of Limitations.*

The next point to be considered, is that as to the circumstances under which the operation of the statute, as a bar, is either wholly or partially suspended.

*In Actions against Banking Corporations.*—The suspension of its operation, in respect of transactions where credit has been given, or where fraud has been committed but not discovered, has been before alluded to; and of a similar nature are the provisions in section 109, by which actions against the directors or stockholders of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law, may be brought at any time within six years after the discovery, by the aggrieved parties, of the facts upon which such penalty or forfeiture attached, or such liability was created, without reference to the period when such facts actually occurred.

The operation of the statute may be also suspended,

1st. By disability of the parties.

2d. By part payment or written acknowledgment of the claim, which points will be successively considered.

*Absence from State.*—The first disability treated of by the Code, is that of absence from the State, in reference to which, it is provided by section 100: That the original absence of a defendant from the State, at the time that a cause of action shall accrue against him, shall entirely suspend the running of the statute; until the full period shall have elapsed after his return to the State; and further, that if, after the accrual of such cause of action, such person shall depart from and reside out of the State, the time of his absence shall, in like manner, be excluded in the computation of the period of limitation.

In the Code of 1849, a mere departure from the State was sufficient to suspend the operation of the statute; but now, under the last amendment, it must be a departure and residence. The *animus revertendi* will, accordingly, be an element which must necessarily enter into any future decisions on the subject.

A conflict of opinion has occurred between the Supreme and the Superior Courts, on the subject of this limitation. In *Coley v. Jessup*, 2 Barb. 309, it was held by the former, that any one

return into the State was sufficient to take the case out of the operation of this provision, and that no other absence, subsequently occurring, could be taken into consideration. In *Ford v. Babcock*, 2 Sandf. 518, 7 L. O. 270, it was held by the latter, on the contrary, that if there be successive absences of a party to the action, they must be accumulated, and the aggregate of them deducted from the term of limitation. A return, however short, without residence, is nevertheless sufficient to set the statute into motion in the first instance; and it was also held, in the last case, that the provisions of it were equally applicable to residents or non-residents. The earlier decisions on this subject are fully reviewed in *Ford v. Babcock*, and are various and contradictory. The recent amendment will, however, remove much of the previous difficulty, inasmuch as residence out of the State is made a further condition, and mere absence will no longer suspend the operation of the statute, when, by any return, for however short a period, it has once commenced to run.

The Court of Appeals has since confirmed the doctrine of the Superior Court, and reversed the contrary decision on appeal, in the case of *Cole v. Jessup*, 18th April, 1854—where it is held in terms, that, when there are successive absences from the State by the debtor, the same may be accumulated, and the aggregate of the whole deducted from the period of limitation. It was also held that the latter branch of the above provision, as it stood in similar terms in the Revised Statutes, applied no less to cases where the debtor resided out of the State when the cause of action accrued, and subsequently came into it, than to those where he was a resident of the State at such time.

In *Bogart v. Vermilyea* 1, C. R. (N. S.) 212, affirmed by the Court of Appeals, 12th April, 1853, it was decided that the statute does not run against one of two makers of a joint and several promissory note, while he is residing in a foreign country, though the other remains a resident, and the action in the mean time becomes barred against him, see 10 Barb. 32. In relation to the conjoint effect of absence from the State, and the death of the debtor during such absence, see *Davis v. Garr*, and *Christophers v. Garr*, 2 Seld. 61, 124, below cited, under the head of Death of Party interested.

The law as to the pleading of a foreign statute of limitations by an alien, or a citizen of another State, will be found fully gone into in Judge Story's admirable treatise on the Conflict of Laws,



chap. XIV. sec. 576 to 583 inclusive. The conclusion come to is, that, as regards statutes of this nature, the *lex fori* will prevail, and that the operation of a foreign law of limitations, however unquestionable as the *lex loci*, cannot be pleaded in bar of an action brought within this State, within the usual period after the coming of the party into it, except probably in those rare cases where the operation of such statute shall have taken away the actual right itself sought to be enforced, and not merely the power of enforcing it.

*Other Disabilities.*—The next disabilities touched upon are laid down by sec. 101, as follows:—

§ 101. If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either :

1. Within the age of twenty-one years ; or,
2. Insane ; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life ; or,
4. A married woman.

The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy, nor can it be so extended, in any case, longer than one year after the disability ceases.

In the Code of 1851, the disabilities here provided for were extended to the case of a party entitled to bring an appeal, but on the recent amendment those words have been struck out.

The conclusion of the supplementary clause is one of the recent amendments.

It effects a most important alteration of the previous law on the subject, and one most essential to be strictly borne in mind in practice. Of course this restriction is not retrospective, and can only be held to apply to rights accrued at the time of the passing of the amended measure. By sec. 106, it is made essential to the assertion of the above, or any other disabilities, that they should be in existence at the time when the right of the party asserting them accrued. Where, however, two or more disabilities are co-existent at that time, the limitation will not attach until all are removed. The cessation of one or more,

whilst any other remains existent, will have no operation whatever; sec. 107.

*Death of Party interested, Statute as for and against Executors, &c.*—The case of the death of a person entitled to bring an action is next provided for by sec. 102. The executor or administrator of such a person may, in all cases, prosecute such cause of action, if it be one that survive, at any time within one year after the death of the party in question, although the limitation may in the meantime have run out. Under the same section, an action may be brought against the executors or administrators of a party who shall have died within the period of limitation, within one year after the issuing of letters testamentary, or of administration, without regard to the interim expiration of that period. In *Bucklin v. Ford*, 5 Barb. 393, before cited, it was held, in accordance with these principles, that, where property belonging to an intestate had come into the hands of a third party after his death, but before the taking out of letters of administration, the statute only commenced to run from the latter date, without regard to the time of the actual receipt of that property.

In *Martin v. Gage*, Court of Appeals, 31st December, 1853, it is laid down that, where an executor is cited before a surrogate, he may avail himself of the statute in bar of any claim presented against the estate, in the same manner as in an action upon it, and likewise that a mere general devise for payment of debts does not prevent the statute from running against debts not specified, which were due prior to the decease of the testator.

In *Christophers v. Garr*, 2 Seld. 61, it is held that, where a resident debtor goes out of the State, and dies without returning, the statute runs in favor of the administrator, after six years from the time when the debt becomes due, excluding the time from the departure of the debtor from the State, until eighteen months after his death, (the period then prescribed under the Revised Statutes.)

In *Davis v. Garr*, 2 Seld. 124, (the note in that case not having become due till after the departure of the intestate,) it was held that, where a debtor resides out of the State at the time when the cause of action accrues, and until his death, the statute only commences to run from the time of granting administration in this State.

*Alien Enemy.*]—The law as it formerly stood in reference to the statute not running in the case of an alien enemy, during the continuance of the war with this country, is declared by section 103.

*Reversal of Judgment, Effect of.*]—The reversal, on appeal, of the judgment on an action commenced within the periods of limitation, confers a fresh right of action upon the plaintiff, or his heirs or representatives, if asserted within one year after that reversal. Sec. 104.

*Injunction or Statutory Prohibition.*]—The granting of an injunction staying the commencement of an action, or any statutory prohibition of the same nature, suspends the operation of the statute altogether, during the continuance of either. Section 105.

*Account Current and Agency, Effect of.*]—The statute may be suspended by the operation of an account current between the parties; the law on this subject is thus laid down by section 95 :

§ 95. In an action brought to recover a balance due upon a mutual open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

It will be seen that the terms of this section are considerably more extensive than the analogous provision in the Revised Statutes. Under the law as it formerly stood, it was held in *Hallock v. Losee*, 1 Sandf. 220, that items on one side only were not sufficient to take a case of current account out of the statute, and that there must be items on both sides, within the period of limitation, to have that effect. The present wording would, however, seem to refer the operation of the statute to the date of the *last* item on either side, in all cases, without reference to there being, or not being, counter items of that date; provided only the account, in its general nature, be clearly one in respect of mutual dealings, commenced before, but continued within the period of limitation.

In *Davies v. Cram*, 4 Sandf. 355, it was held that the statute did not commence to run against the consignor of merchandize to a foreign port, until after the account of its sale by the consignee was received by him.

It is not necessary that moneys collected by an agent should be formally demanded of him. He is bound to give his principal notice of such collection, and, after a reasonable time from the receipt of such notice, the statute will commence to run. *Lyle v. Murray*, 4 Sandf. 590. The same conclusions are come to in *Hickok v. Hickok*, 13 Barb. 632, with reference to the amount of a note collected by a party entrusted for that purpose.

*Acknowledgment, or Part Payment, Effect of.*—We now arrive at the consideration of those cases in which the operation of the statute may be suspended by the acknowledgment of the parties.

The provision of the Code in this respect (sec. 110) is as follows:

§ 110. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

This provision effects, as will be seen, a material alteration from the former law on the subject, by which, under certain circumstances, a parol acknowledgment was sufficient to take a case out of the operation of the statute. See *Watkins v. Stevens*, 4 Barb. 168. See also *Sherman v. Wakeman*, 11 Barb. 254, affirmed by Court of Appeals, 7th October, 1853. Now, however, nothing short of a written acknowledgment, or an actual payment, or part payment of principal or interest, will suffice to do so.

In *McMullin v. Grannis*, 10 L. O. 57, the defendant, having previously accepted a draft in respect of an original indebtedness of the plaintiff, and having subsequently deposited the note of a third party, by different letters, within the six years' period, acknowledged that a balance was due from him on his note, and, on the second occasion, made a remittance, "to be applied on account of his note." It was held, under these circumstances, that such letters amounted to a promise sufficient to take the case out of the statute, and (there being no evidence of any other) that the referee in that case was warranted in inferring that the promise related to the particular indebtedness there in question. "When a promise of this kind is shown, the onus lies upon the party setting up the statute to show that there was

another indebtedness to which it might refer, and, when no other indebtedness appears, the promise will be held to refer to that which was subsisting when the promise was made."

In *Bloodgood v. Bruen*—Court of Appeals, 18th July, 1853—it was held that recognition of the plaintiff's debt by the defendant, in an answer in another suit brought by a different party, was not sufficient to revive the claim. 1. Because it was not made to the plaintiff or to any one representing him, but to a stranger. 2. Because the admission was not voluntary. 3. Because the defendant there in question did not make the alleged admission in the character of executor, in which he was sued, but in another; and, 4. Because, if the admission had been made by him in the character of executor, it could not bind the estate of the testator. If he could do so in any manner, it could only be by a positive contract. It was likewise held that the party in question, as surviving partner, could not, by any act of his, revive the debt as against the estate of his deceased partner. By this decision, the case of *Bloodgood v. Bruen*, 4 Sandf. 427, is wholly reversed.

In *Carroll v. Carroll*, 11 Barb. 293, acts of the executor in the management of the estate were held to be sufficient acknowledgments of his continued liability as such, and to prevent the statute from running as between him and the devisees. A *pro rata* payment by an administratrix, under a surrogate's decree, was however held to be no promise on her part to pay the balance, so as to deprive her of the benefit of the statute, in *Arnold v. Downing*, 11 Barb. 554.

In cases of joint indebtedness, the acknowledgment of either party will of course suffice to bind both, while the joint interest subsists. If, however, that joint interest be severed, the subsequent acknowledgment of either of the parties will not suffice to revive it as against the other. Thus, in *Lane v. Doty*, 4 Barb. 530, it was held that a surviving principal on a joint promissory note, could not revive the debt by acknowledgment or part payment, as against the representatives of the surety deceased, even though the transaction took place within six years. In *Van Keuren v. Parmelee*, 2 Comst. 523, it was in like manner held that, after the dissolution of a partnership, a subsequent acknowledgment by one of the partners did not avail to revive the debt as against the firm.

In *Bogert v. Vermilyea*, 10 Barb. 32, 3 C. R. 142, it was con-

sidered that a part payment by one of two joint makers of a note did not avail to revive the claim as against the other; the decision being expressly grounded on *Van Keuren v. Parmelee*; and that case was also followed under similar circumstances in *Dunham v. Dodge*, 10 Barb. 566.

In *Reid v. McNaughton*, however, 15 Barb. 168, the principles laid down in the above cases were dissented from, and a contrary conclusion came to, with reference to the effect of a payment of interest, by one of two parties jointly and severally liable on a note. A distinction is drawn between the effect of a payment of interest, which of itself implies an acknowledgment of a debt, and mere payments on account, such as had been made in the two cases last cited. Great stress was also laid upon the fact that in making such a payment, the party doing so must be considered as an agent for the other. A distinction is drawn between that case and *Van Keuren v. Parmelee*, where no payment was proved, but the case rested on a mere acknowledgment by one partner, and that, after the joint interest had been long severed by a dissolution.

The case of *Wadsworth v. Thomas*, 7 Barb. 445, 3 C. R. 227, before cited at the commencement of this chapter, is distinct authority that no promise, subsequent to the passing of the Code, will avail to revive a debt already barred by the statute, previous to its operation, unless that promise be in the form here prescribed: although, had it been made under the old law, it would then have been sufficient.

In *Woodruff v. Moore*, 8 Barb. 171, it was held that the payment of a note by the endorser, after the statute of limitations had expired, on action brought against him by the then holder before the statute had run out, did not avail to revive his claim against the maker, against whom the statute had also run. The payment was held to be a payment on his own contract as endorser, and not to have been money paid to the use of the maker.

An action on a demand taken out of the operation of the statute by a subsequent acknowledgment or part payment, is in the nature of an action on the old demand, and not on the new promise, and must be brought accordingly. *Carshore v. Huyck*, 6 Barb. 583.

### § 37. *Action, when deemed commenced.*

The last point to be considered is as to when an action is or is not to be deemed as commenced, for the purpose of taking a demand out of the operation of the different limitations prescribed as above stated.

The provision of the Code on this subject is as follows :

§ 99. An action is commenced as to each defendant, when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county, in which the defendants, or one of them, usually or last resided ; or, if a corporation be defendant, to the sheriff, or other officer, of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

It will be observed, on comparison of this section with that in the Code of 1848, that, now, service of summons on any one joint contractor, or co-defendant united in interest, is sufficient to take the case out of the statute, as against all other parties in the same interest with the parties served, which formerly was not the case. See *Vandenburgh v. Biggs*, 3 How. 316.

On the other hand, the provisions of the former Code are restricted by its being now rendered imperatively necessary that service, either actual or by publication, must, in every case, follow the delivery of process to the sheriff, within sixty days thereafter, in order to render that delivery of any effect whatever.

Actual or substituted service must therefore, in all cases, be made within the period of limitation, or within sixty days after, at the very latest ; and, in the latter case, the summons must be actually in the hands of the sheriff of the county of residence or last residence of the defendants, or one of them, or, in the case of a corporation, in those of the sheriff of the county in which its business has been carried on, within the original period of limitation, whatever that period may be. It is, the writer feels,

superfluous to insist at any length upon the vital importance of this rule being always borne in mind, and always acted upon, within the time allowed. It is a principle so clear as to amount to an axiom.

For certain purposes, however, the action may, in a certain sense, be said to have commenced from the allowance of a provisional remedy, on which, under sec. 139, the court is also to be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. See this subject subsequently considered, and cases cited.

The allowance of such a remedy, though it confers jurisdiction as above, is not however, in strictness, a commencement of the action. *In Re Griswold*, 13 Barb. 412.



## BOOK III.

### OF THE COMMENCEMENT OF AN ACTION, AND THE PRELIMINARIES THERETO WHEN NECESSARY.

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#### CHAPTER I.

##### OF THE PRELIMINARIES TO THE COMMENCEMENT OF AN ACTION IN CERTAIN CASES.

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#### § 38. *Various Preliminaries.*

*Infant Plaintiffs.*]—Before an action can be commenced by, or on behalf of an infant plaintiff, a guardian for the purposes of the suit must be regularly appointed. If the summons be previously issued, the whole proceeding will be irregular, and, on application, will be set aside, *Hill v. Thaxter*, 3 How. 407, 2 C. R. 3; where the appointment of the guardian *ad litem* not having been made till the day of actual service of the summons, and one day after its date and that of the verification of the complaint, the action was held to have been irregularly commenced. The proceedings necessary for this purpose, and the decisions in relation thereto, are treated of in a separate chapter, No. IV., of this portion of the work.

*Lunatics, &c.*]—No action can be brought by the committee of an idiot, lunatic, or habitual drunkard, without the leave of the court by which the commission was issued, previously obtained for that purpose. Such leave must be applied for on petition stating the facts, according to the old practice.

Nor can an action be brought against a lunatic, or other incapacitated party as above, judicially declared to be such, without a similar application being first made to the court. The

provisions as to service of summons in such cases, as contained in sec. 134, make no difference; they do not authorize the bringing an action without leave, but merely regulate the mode of service in that action, when duly brought thereon. The proper course of the creditor in such cases, "is to petition the court for relief, and, if his claim is undisputed, the committee will be ordered to pay it; if disputed, so as to bring its justice seriously in question, a reference will be ordered, or the plaintiff will be permitted to bring an action to determine its justice and extent." *Soverhill v. Dickson*, 5 How. 109; *Hull v. Taylor*, 8 How. 428. This is also a proceeding in which the forms of the old practice must be followed.

*Receivers.*—A receiver appointed by the court cannot, in general, bring or defend a suit, without its consent. Before doing the former, he must apply for leave, in the manner before indicated, with respect to the bringing of suits by committees under similar circumstances. If he omit to do so, and fail in the suit, he will be personally liable for the costs. *Phelps v. Cole*, 3 C. R. 157. This is, however, not the case as regards receivers of a debtor's estate, appointed in the course of supplemental proceedings, after judgment. Secs. 298 and 299 of the Code, and Rule 77 of the Supreme Court. The authority of a receiver of this class to sue, is general, and extends to all cases in which he is not restricted by the special order of the court. The only point in which his discretion in this respect is limited, is with respect to actions brought against insolvents, from whom he cannot obtain his costs. In these cases he will not be allowed them, unless, before bringing such action, he obtain the authority of the court, or the consent of all persons interested. See rule 77.

*Next Friend.*—The circumstances under which a party laboring under disability must appear by a next friend, have been adverted to in a former chapter, under the head of Parties. The selection must of course be made, in those cases, before process is issued, and the party selected must be of ability to answer for the costs of the suit.

*Suing in Formâ Pauperis.*—In addition to legal disabilities, a party may labor under inability to sue with effect, occasioned

by poverty. For this case provision is expressly made by title I. of chap. VIII. part III. of the Revised Statutes, 2 R. S. 444, 445. A party in this position must apply to the court on petition, verified by affidavit in the form there expressly prescribed, according to the former practice in such cases. If the court be satisfied with the facts alleged, counsel and attorneys will be assigned to him, and he will be permitted to prosecute his cause, without being liable to the payment of any fees, or of the costs of the suit. The privilege thus granted is, however, revocable for misconduct; and an order of this nature, though generally a preliminary to suit brought, is, it would seem from sec. 2 of the title before cited, obtainable in a suit then actually existing. As a general rule, however, he must sue as such *ab initio*, or the application, if delayed, may be denied. *Florence v. Bulkeley*, 1 Duer, 705, 12 L. O. 28.

*Actions by Attorney-General.*]—Under sec. 430 of the Code, the leave of the court is also made a prerequisite to actions brought by the Attorney-General, for vacating the charters, or annulling the existence of corporations other than municipal, under the peculiar circumstances there specified.

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## CHAPTER II.

### OF PROCEEDINGS FOR SETTLEMENT OF A CONTROVERSY WITHOUT ACTION BROUGHT.

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#### *General Remarks.*

THE modes of accomplishing this object, as pointed out by the Code, are twofold. 1st. The bringing such controversy to a final decision, upon a case, without going through the forms of an action; and 2d. The confession of judgment in respect thereof; which subjects will be successively treated. Of a somewhat analagous nature to the former, is the reference of a claim to arbitration under the old practice, but which mode of proceeding is in nowise affected by the Code.

### § 39. *Submission of Controversy.*

The submission of a controversy without action is provided for by secs. 372 to 374 of the Code. The parties are thereby empowered to agree upon a case containing the facts upon which such controversy depends, and to present a submission of the same to any court which would have jurisdiction of an action when brought; it being also made to appear by affidavit, that the controversy is real, and the proceeding in good faith, to determine the rights in question. The case having been drawn, and the submission signed by the parties, the matter is then to be heard at the general Term, on printed papers. See Rule 29 of the Supreme Court. From the moment, in fact, that the case and submission have been prepared and signed, the matter takes, in all respects, the shape of an appeal to the general term, from the decision of a single judge upon a case. The papers must be printed and served, points prepared, and the whole case conducted precisely as prescribed in relation to the latter. 'See hereafter under the head of Appeals.

On the decision of the court on the matter thus brought before it being pronounced, judgment is to be entered thereon exactly as in other cases, but without costs for any proceedings prior to notice of trial. The judgment roll is to consist of the case, the submission, and a copy of the judgment, sec. 373. When entered, such judgment may, under sec. 374, be enforced, in the same manner, and subject to the same right of appeal, as if it had been entered in a regular action at that particular stage, and the appeal therefrom lies direct to the Court of Appeals, without the intervention of any intermediate tribunal.

These provisions, in effect, enable parties wishing an amicable settlement of a controversy between them, to place their case precisely on the same footing as if, after having gone through all the regular stages, it had been passed upon by a single judge, and an appeal taken from that decision to the general term; but without the delay and expense consequent on the ordinary proceedings for that purpose.

In *Beach v. Forsyth*, 14 Barb. 499, this course of proceeding was adopted. So also in *Van Sickle v. Van Sickle*, 8 How. 265, where it is laid down that this remedy is only appropriate in cases where no action has been brought. The action which had been there commenced, must, it was held, be deemed to be

abandoned, or at least suspended, and the case considered and determined entirely independent of it. If the submission of the case did not of itself work a discontinuance of the action, it must do so when followed by a judgment, and must, meanwhile, suspend it. In *Lang v. Ropke*, 1 Duer, 701, 10 L. O. 70, it was held that the provisions of the Revised Statutes for granting a new trial, as of right, in ejectment cases, are not applicable to a judgment rendered on a submission of this nature. Such a proceeding is not an action within the scope of those provisions. The submission has the effect of passing the case at once to the general term; nor can the parties be released, on motion, from the legal effect of their submission, so as to enable them to litigate before a jury the facts upon which they had agreed.

The above are the only reported cases bearing on these provisions. They are, in fact, of a nature little likely to give rise to controversy as to their form, the whole proceeding being one of an amicable nature, and only adoptable on express agreement of the parties. For the same reason, this course of action appears incompatible, with reference to the decision of a controversy to which infants or other persons not *sui juris* are parties. The very essence of it is consent, and an admission of all the facts out of which that controversy arises, which, with regard to parties so situated is evidently an inadmissible line of action. The necessity of a full consideration of the whole matter in all its possible bearings, before this course, if proposed, is finally assented, to is evidenced by the case of *Lang v. Ropke*, above cited.

#### § 40. *Confession of Judgment.*

The other mode of settlement, above noticed, is the confession of a judgment without action. By this proceeding, the full benefits of an action are secured to the intended plaintiff, without the corresponding expense to the defendant. It is, therefore, a measure of frequent occurrence, where the latter possesses no real defence, and has no wish to evade his responsibility; or where an arrangement is made between the parties, for security in respect of a present, or indemnity against a future indebtedness. It is equivalent to the cognovit or warrant of attorney, under the old practice, and in the English courts. In the latter, an analogous proceeding is of frequent occurrence, in the shape of an order, obtained by the defendant,

for the plaintiff to show cause why, on a stipulation that he is to be at liberty to enter up judgment at a fixed date, in default of payment of debt and costs at that period, all interim proceedings should not be stayed. A similar proceeding is also adoptable under the Code, where thought expedient, by means of an offer served by the defendant to allow the plaintiff to take judgment for the whole amount claimed by him, and the entry of judgment on that offer.

The main part of the provisions of the Code on this subject were contained in the measures of 1848 and 1849; but the alterations on the amendment of 1851 are important, the larger portion of sec. 384 being new.

This proceeding may be taken for the purpose of securing to the confessee any amount, either due or to become due, or to indemnify him against any contingent liability; and provision may be made for the entry of the judgment, either immediately, or at any future specified date. The mode of proceeding is prescribed by sec. 383, as follows:

§ 383. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

In the Appendix, a form is given, adapted to each of the above contingencies. Where the security is for the purposes of indemnity against future liabilities, the statements of fact must necessarily vary according to the peculiar circumstances. The great thing to be looked to, is the making a concise and clear exposition of the actual facts, in much the same manner, and governed by the same general principles, as are subsequently laid down in reference to averments of fact in pleading.

By sec. 384, the mode of entering judgment on such a statement, and of enforcing such judgment, when entered, are prescribed in terms. This branch of the subject will hereafter be

considered, under the heads of Judgment and Execution; the former differing very slightly, and the latter in no respect, except one, from the usual practice in such cases. The peculiar provision alluded to is of recent insertion, and is to the effect, that, where a confession of judgment of this nature shall provide for the payment of a sum by instalments, execution may from time to time be issued for the instalments then actually due, without prejudice to the renewal of the same proceeding, for the recovery of any subsequent payments. Sec. 384. (See hereafter, under the head of Execution.)

It will be remembered that, in cases where the amount confessed does not exceed \$250, justices of the peace have the power to enter judgment on confession, under art. VIII. title IV. c. II. part III. of the Revised Statutes; the defendant in such cases being, however, obliged to appear before the justice in person. (See former chapter, as to proceedings in these courts.)

A judgment of this nature cannot be confessed by a joint debtor so as to bind his copartner. Such judgment will probably be valid as against the party signing, but it will be void as against the other, and cannot be enforced against the joint property. *Stoutenburgh v. Vandenburg*, 7 How. 229. An offer under the Code seems, however, to stand on a different footing, and in the place of a *cognovit* under the Revised Statutes, and the judgment under it will be enforceable against joint property. *Emery v. Redfield*, 9 How. 130.

A public officer, sued for services rendered to the public, may confess judgment in his official capacity; but the supervisors of the county will not be concluded, and may go behind it and inquire whether the whole or part of the cause of action was a county charge. *Gere v. Supervisors of Cayuga*, 7 How. 255.

A confession of judgment will, it seems, be good, though made to a substituted party, if the transaction be otherwise *bona fide*. *Paton v. Westervelt*, 12 L. O. 7.

In *Schoolcraft v. Thompson*, 9 How. 61, a general statement that the debt for which judgment was confessed, arose in respect of goods purchased of parties and at times specified, was held to be such a concise statement of the facts out of which the debt arose, as fully to meet the requirements of the statute. By this decision, that made in the same case to the contrary effect, and reported 7 How. 446, is reversed.

In *Plummer v. Plummer*, 7 How. 62, a strict view was taken, and it was held that it was not sufficient to state that the debt in question arose on a promissory note, without stating also the consideration given for it. In *Mann v. Brooks*, however, 7 How. 449, this decision was not concurred in, and it was considered that a statement that the debt was due on a promissory note, describing it, was a sufficient specification to bring the case within the terms of the statute; and this latter decision has since been affirmed at General Term. See *Mann v. Brooks*, 8 How. 40.

In *Post v. Coleman*, 9 How. 64, a statement that the defendant gave his promissory note there described, for coal purchased of the plaintiff for the use of the defendant's house, was held to be a sufficient statement, and that the defendant's declaration that the debt was justly due, made it legally due, though, by the terms of the note, the credit had not expired. The debt became merged in the judgment. It was likewise held that the defendant's signature to the verification following the statement, instead of to the statement itself, was a sufficient compliance with the statute; and, likewise, that the verification before one of the plaintiff's attorneys was no objection to the regularity of the judgment. The Rule in that respect does not apply to affidavits preparatory to the commencement of a suit. There is then no suit pending.

A confession of judgment, under the Code, cannot be made in an action arising out of tort. The proceeding is only authorized in respect of money due or to become due, or for security against a contingent liability. These are the only cases affected by the Code. *Boutel v. Owens*, 2 Sandf. 655; 2 C. R. 40.

It would seem, by the same case, as if these provisions were not applicable to the case of confession of judgment, in a suit already commenced, though this is doubtful. It is, however, quite clear, that, where such confession takes place whilst the party is actually in custody, and without the presence of an attorney or counsel to advise him in the matter, the judgment entered on it will be void. Same case. (See also *Wilder v. Baumstauck*, 3 How. 81.) This is in accordance with the rigid rules and practice of the English courts, under similar circumstances.

By sec. 384, the judgment to be entered on a confession of this nature must be endorsed upon the statement, and also entered in the judgment-book. It will be most essential that these rules be literally complied with on all occasions.



These provisions, however imperative, are nevertheless directory in their nature, and therefore the court will not allow an innocent party to suffer, from a mistake or omission of one of its officers in this respect. *Neele v. Berryhill*, 4 How. 16.

The same principle, as to these provisions being merely directory, is also fully sustained in *Park v. Church*, 5 How. 381; 1 C. R. (N. S.) 47. It was there held that, where the defendants had confessed judgment "for a certain amount, but omitted in direct terms to authorize its entry," the judgment could not be set aside for irregularity, the words omitted being merely directory, and the authority being to be implied from the confession itself. It was also held that the defendant could not even be heard to object, after the lapse of a year, which had occurred, which lapse, of itself, barred all relief for irregularity. 2 R. S. 282, sec. 2. In the same case, a liberal construction was put upon a stipulation binding the plaintiff not to issue execution for a limited period, unless, upon actual examination of the books, &c., of the defendants, "he should have good reason to believe himself insecure." The court refused to set aside the execution, though the plaintiffs had not actually examined the books, it appearing clear, from other circumstances, that he had such good reason.

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## CHAPTER III.

### OF SUMMONS, AND ITS SERVICE.

*Preliminary Remarks.*—The proceedings preliminary to the bringing of an action in the regular form having thus been considered, we now arrive, in due course, at the primary proceeding in such action when brought, *i. e.*, the issuing and service of the summons by which it is originally commenced. This process is indispensable for the due bringing of an action in all cases, although, for certain purposes, the action, as hereafter noticed, may be held to be commenced before its actual service.

In one case, and one only, the issuing of a summons will not only be unnecessary, but unadvisable, and that is with reference to moneys collected by an attorney and not paid over on demand,

in respect of which an attachment is issuable under the Revised Statutes. If, instead of issuing such attachment, the client bring an action in the ordinary course, the right to the former remedy will be held to have been waived, and it cannot be afterwards obtained. *Cottrell v. Finlayson*, 4 How. 242.

### § 41. *Summons, Nature and Form of.*

The nature and form of summons are thus indicated by the Code:—

§ 128. The summons shall be subscribed by the plaintiff, or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

§ 129. The plaintiff shall also insert in the summons a notice, in substance as follows :

1. In an action, arising on contract for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint in twenty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint, within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

*Indispensable Requisites.*—It will be seen from these provisions, that the following are indispensable requisites to the regularity of this important process :

1. That the summons should be subscribed by the plaintiff or his attorney.

2. That it should be directed to the defendant.

3. That he should be formally required thereby to answer the complaint in the action.

4. That the place where his answer is to be served should be distinctly specified.

5. That the time within which such service should be made should also be distinctly pointed out.

6. That he should be distinctly warned that, in the event of his not answering, judgment will be taken against him.

7. That the nature of the judgment to be so taken should be distinctly and unmistakably indicated.

With reference to the last of these requisites, the process in question may also be classified into two separate branches, *i. e.*, 1, summons for payment of a money demand, and, 2, summons for relief; the first embracing all actions arising on contract, in which a fixed and specified amount is sought to be recovered; and the second, all those of which a contract, either express or implied, does not form the basis; where unliquidated damages are claimed; or, where the relief demanded consists in the performance of some act, or is otherwise of such a nature that it cannot be represented by a fixed and specific money payment. See form, in Appendix, adapted to both cases. The plaintiff having, under sec. 130, the option as to whether he will or will not serve a copy of the complaint, to accompany the summons in the first instance, the form in question is also adapted to meet this contingency.

*Reference to Complaint.*—In case the complaint is not served, it is requisite, under the provisions of that section, that the summons should state where it is or will be filed. In ordinary cases, a statement to the latter effect will be sufficient, but, where service is made by publication, the previous filing of the complaint is made a condition precedent by the terms of sec. 135; where, too, the title to real property is in any manner in question in the cause, the filing of the complaint in the first instance, is also an advisable preliminary under sec. 132.

It will be observed that, in each of these forms, the name of the court, and also the title of the cause, are inserted in full. It is true that, by the above provisions of the Code, these precautions are not specially required, but neither of them can be safely omitted in any case, and above all, in those where the summons is served by itself, without a copy of the complaint. The omission of the name of the court, in particular, will be a fatal objection. The weight of authority on this subject is conclusive. In *Ward v. Stringham*, 1 C. R. 118, a summons and copy complaint, so served, were held to be a nullity, and leave to amend was refused. In an anonymous case, 2 C. R. 75, a judgment entered upon a summons so issued, the complaint not being served, was also set aside. In *Dix v. Palmer*, 5 How. 233; 3 C. R. 214, the omission in question was held to be "a fatal" objection," (though capable of being waived by subsequent acquiescence;) and in *James v. Kirkpatrick*, 5 How. 241, 3 C. R.

174, the same view was sustained, and a judgment, entered on such a summons, set aside as irregular, leave to amend being only granted, on terms equivalent to the bringing of a fresh action. Nor is *Walker v. Hubbard*, 4 How. 154, an authority to the contrary, for, in that case, although leave was given to amend, when no court was named in the summons, still the name "Sup. Court" was inserted in the complaint itself, (that abbreviation conveying a definite idea, the case being at Albany and not in New York, where it might have given rise to a confusion of terms,) and such leave was only granted upon terms which showed that the court considered the summons and complaint, as they then stood, to be bad altogether, until such amendment had been made.

In the recent case of *Yates v. Blodgett*, however, 8 How. 278, the above decisions are reviewed and in part dissented from. The summons in that case did not give the name of the court, but it appeared correctly upon the complaint which was served with it, under which circumstances, the court held that the latter indication was sufficient, and refused to set aside the summons, though, if served alone, it would have been insufficient.

If the plaintiff sue in any special capacity, the complaint must conform to the summons, and cannot be made in general terms, or the proceedings will be set aside as irregular, *Blanchard v. Strait*, 8 How. 83.

*Foregoing Requisites considered.* 1. *Subscription.*—The following cases have been decided, with reference to the different requisites to a valid summons as above laid down.

1st, as to subscription.

The subscription of an agent of the plaintiff, not an attorney, is bad, and a summons so subscribed will be set aside. *Weare v. Weir v. Slocum*, 3 How. 397; 1 C. R. 105.

Besides subscribing his name, and indicating a place where the answer may be served, the attorney, or party so subscribing, must also add his place of residence, or, if he omit to do so, any subsequent papers in the suit may be served on him by mail. Rule 5 of Supreme Court.

2. *Direction to Defendant.* 3. *Requisition to Answer.*—On the second and third requisites, viz., the direction to the defendant, and the formal requisition to answer the complaint, no question

appears as yet to have arisen. Under sec. 176, the suit may be commenced, and the summons served, in a fictitious name, when the real one of the defendant is unknown, being afterwards amended on its discovery. See *Pindar v. Black*, 4 How. 95. It is not, however, allowable to the plaintiff to use a fictitious name at his discretion; but only when he is ignorant of the true one. Some description must also be given, so as to identify the party intended as far as possible; and the facts of the use of a fictitious name, and of the plaintiff's ignorance of the true one, must likewise appear on the subsequent proceedings. *Crandall v. Beach*, 7 How. 271.

4. *Place of Service of Answer.*]—With reference to the fourth requisite, the above-cited case of *Weare v. Slocum* is also authority, that the summons, to be regular, must require the copy answer to be served upon the actual subscriber, whoever that subscriber may be. In that case, the summons, subscribed by the agent in the name of the plaintiff, required the answer to be served on “*me*,” meaning the plaintiff, at a certain place therein specified, such place being, not the plaintiff's residence, but that of the agent who subscribed in his name; and this direction was held to be clearly bad, on the grounds above stated, though, under the peculiar circumstances of the case, the statute of limitations having run out in the interim, leave was given to amend on terms imposed.

5. *Time of Service.*]—The fifth requisite, *i. e.*, that of the time within which the answer must be served, will be considered in its details hereafter. There can be no question but that a full compliance with this direction of the statute is an indispensable prerequisite to the regularity of process, and would be so held, though, as yet, the point does not seem to have been made the subject of express decision.

6. *Notice of taking Judgment.*)—The sixth requisite, *i. e.*, the formal notice that judgment will be taken in default of answer, seems also, as yet, to have awakened no question, doubtless in consequence of its having been complied with in all instances.

7. *Demand of Judgment or Relief.*]—On the seventh and last requisite, however, *i. e.*, the terms of that notice, more question has arisen, and the distinction between the two different forms

of summons, i. e., the summons for money, and the summons for relief, is one most necessary to be observed.

A summons for relief has been held to be bad, in an action for goods sold and delivered, and judgment was denied, on the ground that the contract was one for the recovery of money only, and should have been sued upon as such. *Diblee v. Mason*, 1 C. R. 37; 6 L. O. 363.

The converse of this proposition was maintained in *Wyant v. Reeves*, 1 C. R. 49, where a summons for money was held to be bad, the complaint merely praying for a foreclosure in the usual form.

In *Leopold v. Poppenheimer*, 1 C. R. 39, and *Williams v. Miller*, 2 C. R. 55; 4 How. 94, it was ruled that an action for damages for breach of promise of marriage, was, although the damages were unliquidated, an action "arising on contract for the recovery of money only," and that, as such, the summons was properly issued in the form of a summons for money.

The authority of *Williams v. Miller* is also confirmed by *Trapp v. The N. Y. & Erie Railroad Company*, 6 How. 237; where it was held that an action for damages in respect of breach of contract, was an action for the recovery of money only, and as such, fell within subdivision 1.

In *Flynn v. The Hudson River Railroad Company*, however, below cited, the learned Judge who decided *Williams v. Miller*, stated that he had never felt satisfied with that decision; and that, although that case and *Leopold v. Poppenheimer* seemed too clearly within the language of the first subdivision to allow an escape, yet he should not regret to see them reëxamined and disapproved. "The rule ought to be, that, when the action is brought for the recovery of a money demand or a sum certain, judgment may be perfected without application to the court, but in all other cases such application should be required;" and this seems the sounder principle, as claims of this kind are, in their very nature, claims for unliquidated damages, although a certain maximum is originally fixed in the summons: and they ought properly, as such, to be made the subject of an assessment in the ordinary form, on a recovery, of whatever nature.

The views last announced seem in fact to have prevailed, as appears from the following cases:

In *Clor v. Mallory*, 1 C. R. 126, it was held that an action for damages against a common carrier in respect of the loss of goods,

fell properly under the division of actions for relief, the learned Judge considering that, though within the letter, a suit of that nature was not within the spirit of subdivision 1 ; and that this last provision was only intended to apply to actions upon contracts for the payment of money upon their face, and not to those in which an unliquidated amount of damages is claimed.

In *Flynn v. The Hudson River Railroad Company*, 6 How. 308, 10 L. O. 158, these views are confirmed, and the foregoing case concurred in, in terms, by the same learned judge who decided *Williams v. Miller*, as before noticed. A judgment entered up against a common carrier, for the amount mentioned in the summons, without application to the court, was there held to be irregular, and an amendment of the summons was ordered, so as to bring the case within the second subdivision instead of the first. The decision proceeds upon the ground that, although in form an action *ex contractu*, the case in question was in fact an action *ex delicto* ; and *McDuffie v. Beddoe*, 7 Hill, 578, is cited in support of this view. See also *Masten v. Scovill*, 6 How. 315, and *Hewitt v. Howell*, 8 How. 346.

In *Webb v. Mott*, 6 How. 439, similar views were entertained, and a summons under subdivision 1, the complaint being for damages for a malicious prosecution, was held to be bad, although, the defendant having appeared generally, the objection was considered waived. See also *Hewitt v. Howell*, 8 How. 346, and other cases given below, deciding in like manner.

The foregoing principles were greatly extended in *Field v. Morse*, 7 How. 12, where, although the action would otherwise have fallen under subdivision 1, allegations of fraud were inserted. It was held that, under these circumstances, the summons was bad, the *gravamen* of the action being fraud, and a judgment which had been taken by default was set aside. In *West v. Brewster*, 1 Duer. 647, 11 L. O. 157, it was held in like manner, that an action against an attorney for moneys collected by him, was an action for relief, and the summons properly issued under subdivision 2.

In *Voorhies v. Scofield*, 7 How. 51, similar views were entertained, and a money summons, the complaint being for wrongfully taking personal property, was held to be irregular.

Where, too, collateral relief seeking to vacate an agreement for extending the time of payment, was prayed for in an ordinary

action on contract, a summons for relief under subdivision 2 was sustained. *Travis v. Tobias*, 7 How. 90.

In *The Cemetery Board of Hyde Park v. Teller*, 8 How. 504, it was held, in like manner, that, where the action is for unliquidated damages, summons for relief is the proper form; where, however, the contract sued upon provides in terms, for the payment of a fixed sum, as liquidated damages, the reverse is the case, and a summons for that amount will be properly issued under subdivision 1.

One general principle may be safely deduced from the various decisions last cited, and particularly from *Webb v. Mott*, *Field v. Morse*, *Voorhies v. Scofield*, and *Travis v. Tobias*, in all of which it is more or less distinctly laid down, viz: that the statement of the cause of action in the complaint, and the incidents to that statement, will, in all cases, be held to control the summons; and that the latter process must be adapted to that statement, and to the relief prayed for, whether direct or collateral. Another general principle seems also deducible from the same series of decisions, viz: that where there is any doubt as to whether the action does or does not embrace more than a mere money recovery, or where the allegations in that action sound anywise in tort, or tend towards making the defendant arrestable on execution, a summons for relief will be the more advisable form of process.

*General Remarks.*]—*Swift v. De Witt*, 3 How. 280, 1 C. R. 25, 6 L. O. 314, is direct authority as to legality of the form usually adopted under subdivision 1, *i. e.*, that the plaintiffs will take judgment for the amount claimed, and also for interest thereon from a given date mentioned in that notice.

The case of *Hill v. Thaxter*, 3 How. 407, 2 C. R. 3, before cited under the last head, evidences the necessity of the preliminary proceedings, necessary to authorize the commencement of a suit in the name of an infant plaintiff, being perfected before the summons is issued.

*Defects and Amendments.*]—Defects in a summons can neither be disregarded under sec. 169, nor amended, as of course, but only on special application to the court under sec. 173. See, on the former point, *Diblee v. Mason*, above cited, and, on the latter, *McCrane v. Moulton*, 3 Sandf. 736; 1 C. R. (N. S.) 157. *Davenport*



*v. Russell*, 2 C. R. 82, is a decision to the contrary effect, but seems of no authority.

The above cases were decided under the Code of 1849, under which process was not, in express terms, made amendable. Any possible difficulty on the question is, however, now removed by the last amendment, by the express insertion of the word "process" in that section.

Although, in several of the cases above referred to, leave to amend the summons was refused, and the universal practice of the courts seems to be to insist upon a strict compliance with the form prescribed; and, in ordinary cases, where the defect is a defect in substance, only to grant that leave on terms equivalent to the bringing of a fresh action, and even, in some few instances, to refuse it; the same strictness has not always been shown where the defects have been of a more technical nature, and not calculated practically to mislead the defendant. Thus, in *Hart v. Kremer*, 2 C. R. 50, where the summons stated, not that the complaint, but that "a copy of the complaint" would be filed, the court held that there was nothing in the objection; and in *Keeler v. Belts*, 3 C. R. 183, a summons which referred to the complaint as "annexed," when such in fact was not the case, was, though held to be bad, allowed to be amended on payment of costs. Where, too, the statute would run unless an amendment be granted, the court will permit one, where otherwise it would have been refused. See the same case, and also that of *Weare v. Slocum*, above cited. Where the application for the above purpose is made after the defendant has appeared, it can only be made upon notice. *Hewitt v. Howell*, 8 How. 346.

Before the making of Rule 86 of the Supreme Court, it was held that, in a summons for relief, the county in which application would be made for judgment, was necessary to be stated, and that such county must be that designated in the complaint as the place of trial. *Warner v. Kenny*, 3 How. 323; 1 C. R. 96; *Anon.*, 1 C. R. 82. Since the making of that rule, however, this is no longer necessary.

## § 42. *Service of Complaint, with Summons.*

It is left optional by the Code, sec. 130, as to whether a copy of the complaint should or should not be served with the summons; but, in a majority of instances, the expediency of adopt-

ing that course is unquestionable; for the obvious reason, that a defendant desirous of delay may wait till the very last day, before he demands a copy of the complaint, and, by then serving that demand, may practically gain an extension of his time to defend, amounting to double that allowed to him, when the complaint accompanies the summons.

There are, however, two classes of cases in which the summons may advantageously be served alone; *i. e.*, 1, those in which an immediate commencement of the action is an object, or in which it is likely that several defendants may defend jointly; and 2, those in which no personal claim is made against any one or more of the defendants.

### § 43. *Notice of no Personal Claim.*

In these last cases, the Code has made provision for the service of a notice to that effect, concurrent with the summons, the requisites as to which are prescribed by sec. 131. See Appendix. Under the Code of 1849, the plaintiff's power in this respect was limited to cases of partition or foreclosure; but, by the last amendment, it is extended to causes of every description, without limitation, and may now be advantageously exercised, with reference to every mere formal defendant, against whom no personal claim is made, in any suit, of whatever nature. In cases involving a claim upon specific real or personal property, a brief description of that property must be inserted. See form as adapted thereto. The benefits of adopting this course, wherever practicable, in reference, both to the proceedings at the outset, and also to the ultimate award of costs in the action, in the event of an unreasonable defence, are obvious; and therefore, wherever possible, it should never be omitted; though, of course, it cannot be done with reference to any defendant against whom substantive relief is sought, and, if attempted under such circumstances, would render the proceedings so far void, *ab initio*. It would seem that, where husband and wife are mere formal defendants, service of notice on the former alone would be held sufficient.

### § 44. *Service of Summons.*

The essentials of a valid summons, and of the accompanying notice, in cases where that course is admissible, having thus

been considered, the next point to be entered upon is that as to their due service.

In courts of limited authority, the mere issuing of a summons *prima facie* confers jurisdiction; and, if such summons be served within the proper limits, the presumption will be that it was duly issued. *Barnes v. Harris*, 4 Comst. 374.

In *Clason v. Corley*, 5 Sandf. 454, it was held that the residence of a defendant within the circuit of a judge under the former equity system, was of itself sufficient to give that judge jurisdiction in an equity suit, though neither had the cause of action arisen, nor was the subject in controversy within that district.

*Persons by whom Service may be effected.*.]—Service may be effected either,

1. By the sheriff of the county where the defendant may be found, or,

2. By any person not a party to the action: and the party subscribing the summons may, if thought expedient, fix by endorsement a specified time for its service. See sec. 133.

*By Sheriff.*.]—*Van Rensselaer v. Chadwick*, 7 How. 297, contains an "*obiter dictum*," that the sheriff's return in such a case is not conclusive, but may be impeached, the precise point however not being in question. The contrary seems nevertheless to be settled, and the conclusiveness of the sheriff's return, as regards acts duly done by him in his official capacity, clearly established by a numerous series of decisions, and, in particular, by the cases of *Learned v. Vandenburg*, 7 How. 379; *Van Kirk v. Wilds*, 11 Barb. 520; *Russell v. Gray*, 11 Barb. 541; *Col. Insurance Co. v. Force*, 8 How. 353; *Sheldon v. Paine*, Court of Appeals, 30th Dec., 1852. The sheriff's certificate must however identify the summons and complaint as that served by him, or the service will be defective. *Litchfield v. Burwell*, 5 How. 341, 1 C. R. (N. S.) 42, 9 L. O. 182.

It seems, though, that some limit should be imposed on this doctrine in extreme cases, such as that reported, 4 How. 112, *Anon.*, where it was held that a judgment entered upon a capias under the old practice, which had been served by the sheriff upon a *wrong* person, was not void for irregularity; the application to set such judgment aside being made on that ground

alone, without any affidavit of merits, or proof of collusion. It seems difficult to understand on what ground this decision proceeded, or how any proceeding could be considered regular, in an action which, as between the real parties to it, had never been commenced at all. In both the cases from *Wendell*, which are cited in the report, the causes had there been duly commenced in the first instance, and the irregularities complained of were of subsequent occurrence, during their progress, and on mere points of form. There seems a wide distinction to be drawn between cases of this nature, and that now under consideration.

The fact, that process under a provisional remedy has been placed in the sheriff's hands for execution, does not render it necessary that the summons should be served by him also. It is equally competent for another party to serve it, in this as in other cases; and that, either before or after the action of the sheriff under the provisional remedy, provided only the summons has been previously issued. *Mills v. Corbett*, 8 How. 500.

*By other Persons.*—In this case it seems clear that the ordinary affidavit by the person employed for that purpose possesses no inherent authority, and may be impeached as under other circumstances, on the facts sworn to being disproved. See *Van Rensselaer v. Chadwick*, 7 How. 297, before cited, which is clearly an authority to this effect.

*Mode of Service.*—The mode of service of such summons, by the party appointed for that purpose, is thus prescribed. A copy must of course be delivered to every defendant served. In actions on contract, however, it is not absolutely imperative that service should be made on all the defendants, prior to the plaintiff proceeding against those on whom it has been effected. *Travis v. Tobias*, 7 How. 90.

§ 134. The summons shall be served by delivering a copy thereof as follows :

1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation, only when it has property within this State, or the cause of action arose therein.

2. If against a minor under the age of fourteen years, to such minor

personally, and also to his father, mother or guardian, or, if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed; to such committee, and to the defendant personally.

4. In all other cases to the defendant personally.

The mere manual delivery of a summons and complaint, or of either, is not good service, unless they be left with the party served. *Beekman v. Cutler*, 2 C. R. 51. It is absolutely necessary that this precaution should be observed, in case of any attempt by that party to return them. The courts, too, will not sanction any false statement or misrepresentation with a view to service within their jurisdiction, and, if that imputation be established, the service so made will be set aside. *Carpenter v. Spooner*, 2 Sandf. 717; 2 C. R. 140; affirmed, 3 C. R. 23.

A non-resident witness, who has voluntarily come within the jurisdiction of the court for the express purpose of being examined, is privileged from the service of process during his attendance. He has the same privilege as a witness attending under subpoena, and that privilege extends to the service of process as well as to exemption from arrest. *Seaver v. Robinson*, 12 L. O. 120.

Service of process out of the territorial jurisdiction of the court is, *ipso facto*, a nullity, so far as judicial proceedings, *in personam*, are concerned, nor can the defect be cured by any admission. The only valid mode of proceeding in such cases is by publication under the next section. *Litchfield v. Burwell*, 5 How. 341; 9 L. O. 182; 1 C. R. (N. S.) 42. See also the case next cited.

Service of a summons on the president of a foreign corporation, temporarily within the State, was held to be good service under the Code of 1849, so far as notice of the commencement of a suit was concerned, in *Hulbert v. The Hope Mutual Insurance Company*, 4 How. 275; affirmed, 4 How. 415: though it was held as above, that, so far as regarded a judgment *in personam*, such service was ineffectual, and that the only mode of making the action of any practical effect was by an attachment. See also *Nones v. The Hope Mutual Insurance Company*, 8 Barb.

541; 5 How. 96; 3 C. R. 161. It will be seen that, by the last amendment, special provision is made for service of this nature, in the section as it now stands.

The same view, as to the necessity of an attachment in these cases, was taken in *Brewster v. The Michigan Railroad Company*, 5 How. 183; 3 C. R. 215. In this case, it was held that service on a mere local agent of a foreign company for special purposes only, was not service on the managing agent within the terms of the above section.

Service upon the baggage-master at a railroad station was held to be insufficient, in an action against the company for loss of baggage. *Flynn v. The Hudson River Railroad Company*, 6 How. 308, 10 L. O. 158. He was held not to be a managing agent, within the terms of the section. "To authorize such a service, the agent must have the same general supervision and control of the general interests of the corporation, that are usually associated with the office of cashier and secretary." The irregularity was held, however, to be cured by the subsequent appearance of the defendants.

When the court has jurisdiction of the action, such an appearance on the part of a foreign corporation will waive all other irregularities, and give jurisdiction of the person. *Watson v. Cabot Bank*, 5 Sandf. 423; see s. 139.

Service on the secretary of a corporation was held to be good, but service on individual corporators to be bad service under the former practice, in *Lucas v. The Trustees of the Baptist Church of Geneva*, 4 How. 353.

Although, by subdivision 3, a special mode of service is prescribed in the cases of lunatics, &c., yet the commencement of an action against a party judicially declared to be such, will not be regular, without previous application to the court, on petition for leave for that purpose, as under the former practice; and, if commenced, the proceedings in such an action will be restrained until such leave has been obtained. *Soverhill v. Dickson*, 5 How. 109. See also *Hall v. Taylor*, 8 How. 428; *Wadsworth v. Sherman*, 14 Barb. 169, affirmed by the Court of Appeals, July 13th, 1853, and *Griswold v. Miller*, 15 Barb. 520, before cited.

Service on a lunatic in person is absolutely indispensable in all cases, whether a committee has been appointed or not. *Heller v. Heller*, 6 How. 191; 1 C. R. (N. S.) 309.

§ 45. *Substituted Service against resident Defendants, in certain cases.*

Additional facilities in relation to the service of process, in cases where the defendant is resident within the State, but cannot be found, are given by the recent measure, c. 511 of 1853, Laws of 1853, p. 974. These provisions run as follows, and apply not merely to process for the commencement, but also to notices, &c., pending the prosecution of an action. They effect an important change, and afford additional and important facilities for the bonâ fide commencement or prosecution of an action against parties not responding in the same spirit.

Whenever it shall satisfactorily appear, to any court, or any judge of the Supreme Court, or any county judge, by the return or affidavit of any sheriff, deputy sheriff, or constable, authorized to serve or execute any process or paper for the commencement, or in the prosecution, of any action or proceeding, that proper and diligent effort has been made to serve any such process or paper on any defendant in any such action, residing in this State, and that such defendant cannot be found, or, if found, avoids or evades such service, so that the same cannot be made personally, by such proper diligence and effort, such court or judge, may, by order, direct the service of any summons, subpoena, order, notice or other process or paper to be made by leaving a copy thereof at the residence of the person to be served, with some person of proper age, if admittance cannot be obtained, or any such proper person found, who will receive the same, by affixing the same to the outer or other door of said residence, and by putting another copy thereof, properly folded or enveloped, and directed to the person to be served, at his place of residence, into the post office in the town or city where such defendant resides, and paying the postage thereon.

On filing with the clerk of the county where such defendant resides, or the county in which the complaint in any such action is by law to be filed, an affidavit showing service according to such order, such summons, subpoena, order, notice, or other process or paper, shall be deemed served, and the same proceedings may be taken thereon as if the same had been served by delivery to such defendant personally or otherwise, as by law now required; but the court may, upon any application by them deemed reasonable, at any time, permit any defendant to appear and defend, or have such other relief, in any action or proceeding founded on any such service, as the nature of the case may require.

*Service by Publication.*—In those cases where the defendant

is non-resident, or cannot be found within the limits of the State, the summons may be served by publication, according to the former practice in equity; and this remedy is not, like the former, of recent introduction, but is, on the contrary, coëval with the Code.

The provisions of that measure on this important subject are, as they now stand, as follows:

§ 135. Where the person, on whom the service of the summons is to be made, cannot, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, or of the county judge of the county where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant, in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by the publication of a summons, in either of the following cases:

1. Where the defendant is a foreign corporation, and has property within the State, or the cause of action arose therein.

2. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

3. Where he is not a resident of this State, but has property therein, and the action arises on contract, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this State, and the defendant has, or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

5. Where the action is for divorce, in the cases prescribed by law.

The order must direct the publication to be made in two newspapers, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post-office.

The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown, at any time before



judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant, against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defence be successful, and the judgment, or any part thereof, have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. And in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

The powers under this section, as it stood in the former measure, are in some respects restricted, in others enlarged by the amendments of 1851. The restrictions imposed are with reference to the application to the county judge, and as to the necessity of a foreign corporation having property within the State, in order to ground a right to this species of relief against them. The power of service in cases falling under subdivision 2, which, in the former act, was limited to actions arising out of contract, is now on the contrary relieved from that restriction; and those imposed upon applications for leave to defend before judgment are now removed. The provisions for the protection of *bona fide* purchasers, under judgments obtained in this manner, have also, for the first time, been inserted by those amendments.

The cases with reference to service upon a foreign corporation, have been already cited in the course of this chapter. See also observations below as to non-resident defendants.

*Fraudulent Departure or Concealment.*—In the subsequent portion of the work which is devoted to the consideration of the provisional remedy of attachment, the question as to what will, or will not, be considered as a fraudulent departure or concealment, will be found treated of in detail. See in particular the cases of *Morgan v. Avery*, 2 C. R. 91, 7 Barb. 656; *Camman v. Tompkins*, 1 C. R. (N. S.) 12; *Gilbert v. Tompkins*, Id.; and *Genin v. Tompkins*, 12 Barb. 265. Where a defendant had established a regular system, by which he had always notice of the approach of the sheriff, with a view to prevent service; but afterwards followed him, on horseback, within sight, but out of

reach, service by publication was denied, on the ground that, though the intent was obvious, it could neither be said that the defendant "could not be found," or that "he kept himself concealed." *Van Rensselaer v. Dunbar*, 4 How. 151. This last state of things is now provided for by c. 511 of the Laws of 1853, above cited.

*Non-Residence.*—The law on this subject is distinctly laid down in *Haggart v. Morgan*, 1 Seld. 422, where it is held that a person may be a non-resident, within the meaning of the statutes relative to non-resident debtors, while his domicile continues within the State. The debtor, in that case, had been detained abroad for three years and upwards, though keeping, and having previously kept up a house within the city of New York, and intending at some time to return. Under these circumstances, he was held to be a non-resident, and an attachment sustained against him. See same principles laid down by the court below, in *Haggart v. Morgan*, 5 Sandf. 198. Similar distinctions between residence and domicile are drawn by the same court, in *Bartlett v. The City of New York*, 5 Sandf. 44; and *Clason v. Corley*, 5 Sandf. 454. The converse of this proposition, *i. e.*, that a party originally a resident, but who had emigrated to another State, and had since returned on a visit to New York, and was then undetermined as to where he should finally reside, was a non-resident, within the meaning of the provisions of the Code as to attachments, will be found laid down in *Burrows v. Miller*, 4 How. 349.

In actions where the defendant is non-resident, the fact of his having property within the State must appear distinctly and affirmatively, or the court will have no jurisdiction. It would seem, that, in these cases, no previous attempt to serve process is necessary, the proof of non-residence being, of itself, sufficient evidence that the party cannot be found within the State. *Vernam v. Holbrook*, 5 How. 3; *Rawdon v. Corbin*, 3 How. 416. See observations above as to the absolute necessity of service of this nature, in all cases where the defendants are non-residents, and cannot be served within the jurisdiction.

*Affidavits on Application.*—The utmost care should be taken in the preparation of the affidavits on which the application is grounded, as the courts are extremely strict in requiring that every provision should be complied with. See *Evertson v. Tho-*

*mas*, 5 How. 45; 3 C. R. 74. The facts necessary to confer jurisdiction must be stated positively, and not on mere information and belief, (*Id.*) although, of course, this rule admits of some qualification, with reference to facts not within the personal knowledge of the party making the affidavit. See this point fully treated in a subsequent chapter, under the analogous head of Attachment, and also with reference to the necessary evidence in cases of arrest.

In every such affidavit, substantive statements of the existence of a cause of action sufficient to give jurisdiction, and of facts sufficient whereon to ground this peculiar species of relief, that a summons and complaint have been made out, and, where the application is under subdivision 2, that due diligence has been used for the purpose of attempting to serve the former, are absolutely essential, and the summons ought to be recited in the affidavit, or referred to as being annexed. See *Rawdon v. Corbin*, 3 How. 416. See also Note, 1 C. R. 13.

N. B.—These decisions were under the Code of 1848, but the amended measures are still more imperative upon the same points. A form of affidavit on applications of this nature will be found in the Appendix. As a matter of course, every fact which tends to show a fraudulent departure or concealment, must be clearly and distinctly stated, with all necessary detail, where an inference to that effect is to be drawn from any combination of circumstances; and, equally of course, the facts so to be proved may be sustained by different affidavits, where they are not all within the knowledge of one single party.

The disposal of the affidavits to be used does not appear to be pointed out by the Code, but the usual, and doubtless the proper practice, will be to file, or to leave them with the judge who grants the order; *Vernam v. Holbrook*, 5 How. 3, above cited. This appears most essential, with a view to establishing the validity of the proceedings, if called into question thereafter. In the same case, a third affidavit, not filed with the order, supplying defects in two which were so filed, was admitted as sufficient to sustain the proceeding, on allegation that it had been used before the judge; and a motion to set aside the order, on the ground of defects in the affidavits which had been filed, was denied.

*Form of Order, &c.*—The form of order to be drawn up on applications of this nature will be found in the Appendix.

The applicant should of course be prepared with the names of two newspapers, to be inserted in the order, and also with the direction of the defendant, or proof that his residence cannot, after due diligence, be ascertained. In this latter case, an allegation to this effect, and proving the exercise of that diligence, must of course be inserted in the affidavits. It is needless to observe, that the strictest compliance with every direction contained in the order is essential. The forms of affidavit necessary for the proof of that compliance, will be found in the Appendix.

*Service out of State, Effect of.*]—In *Litchfield v. Burwell*, 5 How. 341, 1 C. R. (N. S.) 42, 9 L. O. 182, it was held that personal service out of the limits of the State in no respect did away with the necessity of publication under the order, and that its effect was merely to dispense with the service by mail also required as above. This view seemed doubtful at the best, and has since been overruled in *Watson v. The Cabot Bank*, 5 Sandf. 423, where it was held that, by a voluntary appearance, a defendant waived all objection to the mode of service, and that, under these circumstances, jurisdiction of the person was acquired, whether publication was or was not in fact made; and also in *Dykers v. Woodward*, 7 How. 313, where it was held, distinctly, that the defendant's time to answer began to run from the time of personal service on him out of the State, without regard as to whether the publication of the summons was or was not complete; a default which had been taken in that case, under the above circumstances, was accordingly refused to be opened, and judgment given for the plaintiffs.

Service within the State, upon the responsible officer of a foreign corporation, would appear to be merely equivalent to personal service out of the State, on a non-resident defendant, and in no respect to dispense with the necessity of an order for publication being obtained, or of the other requisites of that order being complied with. See *Hulbert v. The Hope Mutual Insurance Company*, before cited.

The complaint need not be published with the summons. *Anon.*, 3 How. 293; 1 C. R. 102, a point clear from the terms of the act itself. It is essential, however, that it should be previously filed, and that the summons should state the date and place of the filing, or the order will be irregular.

*When Service complete.*]—With the exception of the cases last referred to, service of this nature will not, as a general rule, be held to be complete, and the action commenced, until the expiration of the time of publication, as prescribed in the order, sec. 137. Where, therefore, the defendant had died during that period, it was held at special term that no action was pending, that could be revived against his representatives. *McEwen's Executor v. Public Administrator*, 3 C. R. 139.

The above general doctrine was confirmed by the General Term on appeal, though, with reference to the peculiar circumstances of the case, it was held that an action had been duly commenced against the deceased, by the granting of the provisional remedy of attachment during his lifetime. *Moore v. Thayer*, 6 How. 47, 3 C. R. 176, 10 Barb. 258.

The proceedings with reference to the entry of judgment on the expiration of the time limited for publication, will be hereafter considered. It has been an usual practice to enter up such judgment forthwith, on the expiration of the period mentioned in the order. In *Tomlinson v. Van Vechten*, however, 6 How. 199; 1 C. R. (N. S.) 317, it was held that the service of the summons is not complete until that time, and that the defendant has the usual period of twenty days to answer, in addition, before judgment can be taken. See, however, *Dykers v. Woodward*, above noticed.

*Defendant's power to come in and defend.*]—It remains to notice the measures which the defendant may take to set aside service of this nature, or to obtain leave to come in and defend, after judgment obtained thereon.

It will be seen that, at any time before judgment, the defendant may come in and defend, as of course; and that he possesses the full power of doing so, and of enforcing restitution, if he prevail, (except as regards the rights of *bonâ fide* purchasers,) within a very extended period after its rendition, except in the single case of divorce, on proof that he has not had a full year's previous notice of such judgment; a provision which renders it highly advisable that, wherever practicable, a formal notice of judgment being entered should be forthwith served upon him on the part of the plaintiff. Under the Code of 1849, a defendant, who had been personally served out of the State, or who had received the summons by post, was pre-

cluded from coming in to defend after judgment. See *Hulbert v. The Hope Mutual Insurance Company*, before cited; but this restriction no longer exists under the recent amendments.

The courts will not, however, interfere with the discretion of a justice, granting an order of this nature, or set such order aside, merely because the evidence on which it was granted was slight. *Roche v. Ward*, 7 How. 416.

*General Remarks.*—In many cases where an order of this description is obtainable, the same state of facts will warrant an application for an attachment, (see *Moore v. Thayer*, above cited,) which may be made at the same time, and on the same affidavits; though it by no means follows that the latter will, in all cases, be also granted—the greater stringency of that species of remedy, rendering the courts more jealous as to its exercise.

By the above section, provision is not made for the case of a defendant, whose residence cannot be ascertained on due inquiry. In *Close v. Van Husen*, 6 How. 157, it was held that, under these circumstances, the plaintiff still possessed a remedy in equitable cases, under the act of April 12, Laws of 1842, p. 363, where the last known residence of the defendant was within the State; and that such act was not inconsistent with the Code, and therefore still in force. The plaintiff, it was held, “should present his application by petition, bringing his case within the 135th section of the Code, so far as form is concerned, and the first section of the act of 1842. The publication of the order should be in two newspapers, to be designated as most likely to give notice to the persons to be served, and for the period of three months. (Compare Code, sec. 135, with Law of 12th April, 1842, sec. 2, subd. 2.)” This state of things is, however, now provided for by the recent statute, c. 511 of the Laws of 1853, above noticed.

#### § 46. *Service on several Defendants, Joint Debtors, &c.*

The provisions of section 136, under which, in actions against several defendants, the summons may be served upon any one or more of them alone, and separate proceedings taken thereupon, against the parties so served, will be remarked; though,

of course, it will be premature, at this point, to enter into the details of those proceedings. The peculiar description of process by means of which parties against whom a joint judgment has been entered without personal service upon them, or the representatives of a deceased judgment-debtor may be respectively summoned to show cause why they should not be bound by the judgment already on record, will be hereafter considered in connection with those proceedings. See sections 375 to 378 inclusive, and Forms in Appendix.

### § 47. *Proof of Service.*

The following are the provisions of the Code on the subject of the proof of service of summons, &c., as above:—

§ 138. Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff, his certificate thereof; or,
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, as required by law, if the same shall have been deposited; or,
4. The written admission of the defendant.

In case of service, otherwise than by publication, the certificate, affidavit, or admission, must state the time and place of the service.

*Sheriff's Certificate.*—It is essential that the sheriff's certificate should identify the summons and complaint served by him, as being the summons and complaint in the cause, or the service will be defective. *Litchfield v. Burwell*, 5 How. 341; 9 L. O. 182; 1 C. R. (N. S.) 42. With respect to the conclusiveness of the sheriff's certificate, see sec. 44 in the prior portion of the chapter, and the various cases there cited.

The sheriff's fees, in respect of service of process and papers as above, are as follows: For service of the summons, or summons and complaint, 50 cents; for service of notice of object of suit, 37½ cents in addition; and for his certificate of the service of both summons and notice, one fee of 12½ cents only, in addition to those for mileage, at 6 cents per mile, for going only, to which he is entitled under the Revised Statutes, 2 R. S. 644. See *Gallagher v. Egan*, 2 Sandf. 742.

*Affidavits, Admissions, &c.*—The necessary particulars of the affidavit of service, when made by a person in the ordinary form, are fully prescribed by Rule 90 of the Supreme Court: see Form, in Appendix. The forms of affidavits in cases of service by publication are also there given. Where the written admission of the defendant is relied upon, it would seem from *Litchfield v. Burwell*, above cited, that it is absolutely essential that his signature to such admission, and the fact that he is the party to the cause, should be proved by independent evidence. The court will take judicial notice of the signatures of its officers, because they are such, but they cannot be presumed to know that of a party defendant, who has not appeared in the cause.

### § 48. *Appearance of Defendant.*

The provision in sec. 139, with regard to the voluntary appearance of a defendant being equivalent to due service upon him, is one of the amendments of 1851, and is of course highly calculated to promote the convenience of suitors, though perhaps, in strictness, only declaratory of the previous law upon the subject.

As a general rule, it holds good that a voluntary appearance in an action waives all objection to the process by which it was commenced. See *Webb v. Mott*, 6 How. 439; *Hewitt v. Howell*, 8 How. 346, above cited. See also *Watson v. Cabot Bank*, 5 Sandf. 423; *Flynn v. Hudson River Railroad Company*, 6 How. 308; 10 L. O. 158. This rule, though sound in general, is not, however, of conclusive application. Thus, in *Voorhies v. Scofield*, 7 How. 51, it was considered that where the summons is served alone, and the defendant is obliged to demand a copy of the complaint, in order to see what it contains, he might still, under these circumstances, object to the summons for irregularity, on a manifest variance thus becoming apparent; and the general principle to the contrary, as broadly laid down in *Webb v. Mott*, above cited, was so far doubted. In *Grainger v. Schwartz*, also, 11 L. O. 346, it was held that a general appearance on the part of the defendant will not effect a waiver of a jurisdictional defect in the plaintiff's proceedings.

One of several defendants, who has not yet been served with process, cannot voluntarily appear and move to dismiss the



complaint, under sec. 274, where his rights are not affected. He must be contented to remain quiet out of court, until invited to appear there, unless he has some right to protect, rendering such appearance necessary. *Tracy v. Reynolds*, 7 How. 327.

The periods, at which an action will be held to have been commenced by service or delivery of process to the sheriff, and also with reference to publication, or the allowance of a provisional remedy, have already been considered, under the head of Limitations. See *ante*, sec. 37; Code, secs. 99 and 139.

### § 49. *Closing Remarks on above head.*

Before entering upon the general proceedings in a suit, the appointment of a guardian *ad litem*, and his duties, may advantageously be considered at the present juncture; as, where suit is brought in the name of an infant, such appointment must, of necessity, take place as a preliminary to any other proceeding in the action, and, in fact, to the bringing of the action itself. The subject of a similar appointment on behalf of an infant defendant, and that of the appointment of a general guardian under the old practice, and the duties of the latter, bear so close a relation to that last proposed, that, although the former properly belongs to a later period of the action, and the latter is, in strictness, referable to the head of special proceedings, the present seems evidently the most convenient stage of the work for a separate consideration of these subjects, as one connected whole; which course will accordingly be pursued in the succeeding chapter, references being made to it, in the subsequent portions of the work, where requisite.

## CHAPTER IV.

## OF THE APPOINTMENT OF GUARDIAN, AND HIS DUTIES.

§ 50. *General Remarks.*

THIS proceeding is one of those provided for by the Code, and the rules of the Supreme Court, and is necessary to be taken at the outset of any suit whatsoever, to which an infant is a party, whether plaintiff or defendant. The question has also a general aspect, in relation to the guardianship of infants holding property, irrespective of any suit brought by or against them; and the consideration of it has therefore been reserved for the present juncture.

The subject divides itself accordingly into two separate, though connected heads, viz; 1. The appointment of a general guardian; and 2. That of a guardian *ad litem*. The provisions of the Code itself have only reference to the latter subject; those of the rules, however, embrace both.

§ 51. *General Guardian.*

The questions in relation to the appointment and duties of a general guardian, depend entirely and exclusively upon the provisions of the Revised Statutes, and are in all respects governed by the old practice. Any thing beyond a mere general reference to them, would therefore be clearly incompatible with the present work, and will not, accordingly, be attempted.

The appointment of a guardian of this nature, rests with the father of the infant, in the first instance; and, in default of appointment by him, with the courts. The rights of the former in this respect, are specially saved by secs. 1, 2, and 3, of title III. chap. VIII. part II. of the Revised Statutes, 2 R. S. 150, and are exercisable by deed or will. The rights and powers of a guardian so appointed are absolute, and prevail over those of the guardian in socage under the common law, as saved by secs. 5 to 7, of art. I. title I. chap. I. part II. of the

same statutes, 1 R. S. 718. The latter are, in fact, little better than illusory, as, under sec. 7, of that article, they are to be superseded, in all cases where a special appointment shall have taken place.

In default of nomination by the father as above, the appointment of a guardian rests with the courts, either by inherent or special authority. The inherent authority in this respect was vested in the chancellor, before the abolition of that high office, and now rests with the Supreme Court, as exercising its duties by substitution. The practice of the latter tribunal, in this respect, is fully defined by the recent rules, Nos. 54 to 62 inclusive, which should be carefully consulted accordingly. A special statutory authority is also exercisable by the surrogate, under title III. chap. VIII. part II. of the Revised Statutes before referred to, which title, together with the works on the practice of those tribunals, should therefore be fully looked into, though even a notice of them would be beyond the province of the present work.

The rules of the Supreme Court above alluded to, provide shortly as follows: The general guardian of an infant is to be appointed on petition of the infant himself, if fourteen or upwards; or if under that age, then of some relative or friend. Rule 57. The petition must state full particulars; and the court, under rule 58, are to examine into all the circumstances, and name a proper person.

The security to be given by such guardian on his appointment, is prescribed by rule 55; and no moneys arising from the sale of real estate of an infant, on mortgage or partition sale, or under a decree or judgment, except any portion of principal or income allowed for maintenance of the infant, are to be paid over to him, unless he have given sufficient security on unincumbered real property, rule 56; and a general guardian already appointed, may, under rule 54, be required to give further security in cases of this nature.

Provision is made by art. VII. title II. chap. I. part III. of the Revised Statutes, 2 R. S. 194 to 197, in relation to the sale of the real estates of infants on special application; and the practice to be adopted in this respect, the nature of the petition, the security to be given, the form of order to be made, and the proceedings thereon, will be found fully prescribed by rules 59 to 62 inclusive.

The following anonymous case is reported at 4 How. 414, with reference to the security to be given under rule 59.

A guardian having been appointed, under rule 61, to sell a piece of real estate belonging to five infants, and the order having directed separate surety bonds to be given to each infant, in the sums thereby expressed, five bonds were given accordingly, with a separate affidavit on each, the same persons being sureties in all. It was held that, to make such parties competent as sureties, they must justify in the aggregate amount of all the bonds given. One only of such bonds was therefore approved; and, as to the other four, it was held there must be other sureties, or a further justification.

In *White v. Parker*, 8 Barb. 48, the general relations of guardian and ward, and the duties and responsibilities of the former, are very fully reviewed, and the following conclusions were come to by the court:

It is the duty of a guardian to get possession and control of his ward's personal property, and the rents and profits of his real estate; to keep and protect the same; to keep it invested; and to render a just and true account thereof, on the ward's becoming of age.

He cannot trade with it himself, on account of his ward, nor buy or use his ward's property for his own benefit.

All advantageous bargains which a guardian makes with the ward's funds, will enure to the benefit of the ward, at his election.

He cannot convert the personal property of his ward into real estate, or buy land with the ward's money. If he does so, his ward, when he arrives at full age, will be entitled, at his election, to take the land or the money with interest.

He should keep his ward's property separate from his own; otherwise he will make it his own, so far as to be accountable for it, if lost. If he takes notes or other securities, for money belonging to his ward, in his own name, he converts the property to his own use, and is *prima facie* accountable for it.

Thus, if the guardian surrenders contracts for land, and takes deeds in his own name, and pledges his personal responsibility for a part of the purchase-money, this will be held a conversion of the contracts to his own use; and the ward may adopt the transaction, or claim from the guardian the value of the land contracts, at his election.

A guardian acting within the scope of his powers, is bound only to fidelity, and ordinary diligence and prudence, in the execution of his trust. And his acts, in the absence of fraud, will be liberally construed.

A guardian is not responsible for open propositions made by him, in a preliminary talk or friendly conversation, before he assumes the duties of his trust. Nor is his surety liable for the conversations, or open propositions of his principal, before he became his surety. The liability of a guardian and his sureties, are simultaneous in their commencement, and coëxtensive in their object and duration.

A guardian has no authority to make any improvements on the land of his ward without the authority of the Court. If he does so, and advances the amount out of his own pocket, he cannot recover it from his ward. *Hassard v. Rowe*, 11 Barbour, 22.

Where special authority had been given to a guardian to cancel a bond and mortgage, on specific counter security being executed, and he had done the former, without receiving the latter, it was held that his authority was conditional, and that the discharge so executed by him was void, and did not protect subsequent mortgagees, without actual notice, against the claim of the infants, the condition not having been performed. *Swart-hout v. Curtis*, 1 Seld. 301.

A similarly strict view was held in *Gale v. Wells*, 12 Barb. 84, where a promissory note signed by the ward as surety for the guardian's debt, soon after the former came of age, was held to be void by a majority of the judges in the first district; the holders of that note having been aware of the previous relations of those parties; *Edwards, J.*, however, dissenting, on the ground that the ward, being of age, was competent to contract, there being no evidence of actual fraud.

Where a guardian had been appointed by the Surrogate under the provisions of the Revised Statutes above cited, and the proceedings had been regular, it was held that the exercise of the Surrogate's jurisdiction could not be impeached collaterally, and that a suit, in order to remove such guardian on the ground of fraud in the original proceedings, could not be maintained, but that the proper course was to make a fresh application to the Surrogate to vacate the previous proceeding. *Dutton v. Dutton*, 8 How. 99.

In cases where the infant is seized of an undivided share of lands, sought to be partitioned by the other parties interested, the general guardian possesses peculiar and extensive powers of concurring therein, or in a sale for such purposes on behalf of the infant, under the provisions of the Revised Statutes in this respect. See this subject fully noticed, under the head of Partition.

### § 52. *Guardian ad litem.*

The relations and duties of a general guardian having thus been shortly considered, though in strictness extraneous to the subjects treated of in the present volume, the question as to the appointment of a guardian *ad litem*, remains to be considered, which forms the subject of special provision in the Code, and is a necessary concomitant of proceedings under that measure, in all cases where infants are parties to those proceedings.

The guardian *ad litem* is an officer specially appointed by the court, to take charge of the interests of any infant party, whether plaintiff or defendant. The sections of the Code in reference to this subject, are Nos. 115 and 116, which run as follows :

§ 115. When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

§ 116. The guardian shall be appointed as follows :

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or, if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one ; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State ; if he has none, then to the infant himself, if over fourteen years of age and within the State, or, if under that age and within the State, to the person with whom such infant resides.

The latter of these sections is considerably modified by the two last amendments. In the act of 1849, the application for the appointment of the guardian of an infant plaintiff might, if under fourteen, be made by any other party to the suit. These words are now stricken out, and the power of application given instead to the general or testamentary guardian, if any; and the provisions as to the notice to be given, if the application be made by a relative or friend, in any case, or by a party to the action, in the case of an infant defendant, are likewise new.

In the measures of 1848 and 1849, the applications for this purpose were expressly directed to be made by petition, which word is now stricken out, and the general term application substituted. It seems to follow, as a necessary consequence, that this proceeding may now be taken by motion in all cases; and such might very probably be the construction adopted, with regard to the appointment on behalf of an infant defendant, where the substantive facts in relation to the infant's interest in the subject-matter in controversy appear already on the pleadings, and the facts in relation to the actual appointment, and its preliminaries, are merely collateral, and may, therefore, with propriety be shown by affidavit. The form of application by petition may, however, be adopted under any circumstances; and it seems by far the most expedient in all, especially when the appointment is made on behalf of an infant plaintiff, and therefore before suit commenced, rendering it necessary that the facts in relation to the infant's interest should be substantively shown, in order to form a groundwork for any order at all in the matter. See this question more fully considered under the head of Interlocutory Proceedings. See also the Rules of the Supreme Court, as below cited.

The form of a petition for this purpose will be found in the Appendix, being substantially the same as that under the former practice.

Similar provisions to those above cited are contained in title II., chap. VIII., part III. of the Revised Statutes, 2 R. S. 446 and 447; they may, however, be looked upon as mainly superseded by those of the Code now under consideration.

Stringent restrictions are laid by the Supreme Court upon appointments of this description under the recent rules. By Rule 53, it is provided that

No person shall be appointed guardian *ad litem*, either on the application of the infant, or otherwise, unless he be the general guardian of such infant, or an attorney or other officer of this court, who is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian, who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence of the suit.

In *Cook v. Rawdon*, however, 6 How. 233, 1 C. R. (N. S.) 382, it was held that the restrictions imposed by this rule, in relation to the guardian being of necessity the general guardian, or an attorney or officer of the court, are not applicable to a guardian for an infant plaintiff, but only as regards defendants.

The guardian for an infant plaintiff must, however, be a responsible person, for he is liable for costs, and this should be shown before his appointment.

If the court clearly discovers that the interests of the infant are committed to a guardian who is not likely to protect them, he should be removed, and a proper one appointed. *Litchfield v. Burwell*, 5 How. 341; 9 L. O. 182; 1 C. R. (N. S.) 42.

An attorney or officer of the court, when so appointed on behalf of an infant defendant, is bound to act; and must examine into the circumstances, with a view to making a proper defence, when necessary; for which services he is to receive such compensation as the court may deem reasonable. Rule 52.

*Course on Appointment in Partition.*]—The appointment of a guardian *ad litem*, in partition cases, takes place under the special directions for that purpose, in sec. II., title III., chap. V., part III. of the Revised Statutes, 2 R. S. 317, under which it is competent for any party interested, to apply and obtain such an order, on ten days' notice served upon the minor, or upon his general guardian, if resident within the State, but otherwise without notice; such guardian to represent, and his acts to bind the minor, (sec. 3,) and to give security as the court shall direct, (sec. 4.) In case no proper parties shall be willing to become security, the Court of Chancery might, in a suit, appoint its own officer without security, on notice to the minor or his guardian in all cases; Laws of 1833, chap. 277: and such power is doubtless now exercisable by the Supreme Court.



*Under Code.*]—The course pointed out by the Code is so simple and easy, that it evidently appears to be the most advisable in all cases, and that, notwithstanding the alteration in sec. 116, above alluded to. The petition must, in the first instance, be duly signed and verified, and the written consent of the proposed guardian to serve must be subjoined. What is called the usual affidavit must accompany it, speaking to the particulars required by Rule 53, and likewise as to the solvency of the guardian proposed. See *Cook v. Rawdon*, 6 How. 233, 1 C. R. (N. S.) 382, above cited. Where the infant is plaintiff, and money is sought to be recovered, a bond, in double the amount, according to the form prescribed by Rule 55, should be prepared, and should accompany the other papers. On these papers an order should be applied for and entered in the usual manner. The application is almost necessarily *ex parte*, and, under the Rules as they stood before the recent revision, the order might be entered by the clerk as of course, under a judge's certificate, but this course of proceeding is now abrogated. Where, however, there is any contest or doubt on the subject of the appointment, or where the court or judge applied to, thinks fit to prescribe that notice should be given, the same course of proceeding must be adopted, and the application be made, in the same manner as in other motions in the cause.

The guardian, when appointed on behalf of a sole infant plaintiff, is responsible to the defendant for the costs of the suit, if the latter prevails. The contrary is the case as regards the guardian of an infant defendant, unless he be specially charged, by order of the court, for some personal misconduct in the cause. See 2 R. S. 446 and 447, sections 2 and 12. He may, however, receive costs and expenses allowed by the court to him out of the fund, or recovered by the infant in the suit—Rule 54—but, beyond this, he cannot receive any money or property belonging to the infant, or awarded to him in the suit, without having first given security as above referred to.

It is not necessary to serve a copy of the order appointing a guardian on the opposite party, though it is competent so to do. The fact will of course appear on the pleadings by substantive allegation, either in the title or otherwise.

The guardian for an infant plaintiff must be appointed before summons issued. Where, accordingly, such appointment had been made, after issuing, but before service of summons and

complaint, the latter were set aside as irregular. *Hill v. Thaxter*, 3 How. 407; 2 C. R. 3.

A judgment against an infant defendant by default, without the previous appointment of a guardian *ad litem*, was set aside on motion, without imposing terms, and with costs, in *Kellogg v. Klock*, 2 C. R. 28.

No consent of a guardian, on behalf of infants, will render valid a judgment against them, in the absence of legal proof, or any other irregular proceeding in the cause. *Litchfield v. Burwell*, above cited. Nor is the responsibility of the guardian to the infant, any answer to the objection. In the same case it was held, as above noticed, that, where the court discovers that the interests of the infants are committed to a guardian who is not likely to protect them, he should be removed, and a proper one appointed.

Where a husband and an infant wife sue in respect of joint property, no appointment of guardian *ad litem* in respect of the latter is necessary, the husband appointing an attorney for both, and being responsible for the costs. *Cook v. Rawdon*, 6 How. 233; 1 C. R. (N. S.) 382. See also *Hulbert v. Newell*, 4 How. 93.

Where, however, the suit is in respect of the wife's separate property, it would seem that the reverse is the case. *Cook v. Rawdon*, 6 How. 233; 1 C. R. (N. S.) 382, and *Coit v. Coit*, 6 How. 53, as before referred to. (See this subject heretofore examined under the head of Parties.)

## BOOK IV.

## OF THE FORMAL MACHINERY OF AN ACTION.

§ 53. *Preliminary Remarks.*

PROCEEDINGS in a regular action may be classified under two general divisions, viz.—First, the ordinary, and Second, the extraordinary: the former incident to all proceedings without distinction; the latter collateral, and adoptable or not, at the discretion of the parties.

The ordinary proceedings in a suit will not be entered upon here, but will be considered in the following portions of the work, in due order; and, with them, the essential characteristics of any interlocutory or extraordinary applications that may be necessary from time to time, will also be noticed. The present chapter will be exclusively confined to the mere formal proceedings incident to all such applications, and also to the progress of the cause, in a general point of view only, without regard to the merits, or the particular proceedings involved.

In most, if not all, of the practical works of a similar nature to the present, this dissociation of matters of pure form from matters of substance, has been more or less attempted, but with various differences in the mode of arrangement. In some, the consideration of interlocutory applications, in particular, is deferred to a supplemental chapter: in others, the same matter is treated of in an introductory form. Each method presents certain relative advantages. By the one, the student is enabled to enter upon the regular march of a suit, at once, without being detained by preliminary considerations; the other places him at once in preliminary possession of the required information on various points, for which he must otherwise be continually looking forward.

Allusions to different species of interlocutory remedies or

formal proceedings occur, of necessity, in almost every page, in treating of the general progress of a suit; and it seems, therefore, of the two, the more conducive to convenience, to introduce the necessary information as to the forms required in these cases, at an earlier stage of the work.

Interlocutory proceedings may be reduced under the two general heads of Motions and Orders, and their necessary preliminaries. The merely formal machinery of a suit includes a variety of subjects of general application. The latter will be taken first, and the former treated of at the conclusion of the chapter.

### § 54. *Notices, and Service of Papers.*

Written notices to the adverse party are, in the first place, necessary in connection with almost every proceeding, in every stage of the cause. The essentials of such notices will be treated of hereafter, in connection with each subject. All must, however, under sec. 408, be in writing, and be duly served on the adverse party or attorney.

The mode of service of notices, of whatever nature, and of papers in the suit in general, is thus prescribed by section 409 :—

§ 409. The service may be personal, or by delivery to the party or attorney on whom the service is required to be made : or it may be as follows :

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open, so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Where, however, the party has already appeared by attorney, service of all papers whatsoever must be made on the latter. The provisions of sec. 417 are express on the subject, as follows:

§ 417. Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

Service on the party of the ordinary papers in a suit, after an attorney has appeared for him, will not be good. In *Tripp v. De Bow*, 5 How. 114, 3 C. R. 163, a notice of appeal served on the party, instead of the attorney, was decided to be bad, and such appeal was accordingly held to be a nullity. It was also held that the objection might be taken advantage of at any time, provided the party served had not appeared and answered, or proceeded in such a manner as to waive the defect, and give the court jurisdiction. The attorney of the party must, of course, be the attorney of record. Service on a mere agent will not be available. See *Weare v. Slocum*, 3 How. 397; 1 C. R. 105.

The following exception from the above provision is effected by sec. 418:

§ 418. The provisions of this chapter shall not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Whenever, therefore, a proceeding is of a penal nature, or any specific act is commanded or forbidden to be done, the service must be personal. In a large proportion of these cases, it may, however, be prudent to notify the opposite attorney also.

Where a defendant has not demurred or answered, service of notices or papers, in the ordinary proceedings in an action, need not, under sec. 414, be made upon him at all, unless he be imprisoned for want of bail, or unless a regular notice of appearance has been given. In this latter case, service must be made on him or his attorney in the usual manner.

The mode of service being so clearly prescribed by sec. 409, as before cited, it would be useless to repeat the directions there given. The form of an affidavit of service adapted to the different states of circumstances mentioned in that section, will be found in the Appendix. Service may also be proved by the admission of the attorney, to procure which is an usual and convenient practice. One signed by the party would also be valid, but is less unobjectionable, inasmuch as the court cannot take judicial notice, but may, on the contrary, require actual proof of his signature.

In order to the due regularity of service on a clerk, or person in charge, it should be ascertained that the attorney is absent from his office at the time, as, if not, it may be questionable whether service upon any other party will be strictly regular. It is clear that a notice cannot be properly served when the office is not open, by passing it under the door, or otherwise, and clear also that service upon a clerk, or person in charge, is not regular, if made elsewhere than in the office itself. The limitations as to hours, in cases of service at the residence of either party or attorney, should likewise be carefully noted. Although, in strictness, a paper must be served within due time, or otherwise the service will be null; still, where due diligence has been used, and that service has been rendered impossible by the act of the intended recipient, the court will not allow him to take advantage of his own wrong, and will hold subsequent service at the earliest possible period, to be regular. Thus, in *Falconer v. Ucoppell*, 2 C. R. 71, where, on the last day for serving an amended answer, the defendant endeavored, in office hours, to make the service, both at the plaintiff's office and dwelling; but both were closed, and no one could be found to receive it, but, on the following day, the same was served personally, with notice of the attempted service of the day before; it was held that, in making the best possible service, the defendant was regular, and the plaintiff was fixed with the costs of the motion.

Of course this doctrine is only adapted to extreme cases, where full diligence has been used, and the conduct of the other side has been evidently evasive. Unless the moving party has made every possible effort, and fails, not from want of any exertion of his own, but from the absence or bad faith of the opposite party, it would, on the contrary, be most unsafe for him to rely on obtaining relief of this description. Where a paper has been refused by an attorney as served out of due time, a subsequent service on his clerk, in ignorance of the refusal of his principal, was held of no avail; *O'Brien v. Cutlin*, 1 C. R. (N. S.) 273.

In sec. 415, provision is made for the case of a party who has appeared in the action, but who resides out of the State, and has no attorney within it. In this case, the service may be made by mail, if his residence be known; if not, on the clerk for the party. The last clause is somewhat obscure, and seems, in fact, contradictory to previous portions of the Code, which expressly provide that, as regards the summons on the one hand, (sec. 128,)

or the notice of appearance on the other, (sec 130,) a place for service within the State must be named; service at which place would doubtless, under such circumstances, be held as regular; both generally, and under Rule 5 of the Supreme Court.

It is clear that service on a Sunday is not admissible under any circumstances, and, if made, will be irregular. See *Pulling v. The People*, 8 Barb. 384; *Field v. Park*, 20 Johns. R. 140; and other cases hereafter cited in the present chapter under s. 46.

With a view to the affording all proper facilities in relation to service of papers, Rule 5 of the Supreme Court provides as follows:

On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of residence; and if he shall neglect so to do, papers may be served on him through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

See remarks in relation to service by mail under the next section.

It is clear that when an attorney, or party acting in person, changes his residence pending the suit, he ought to notify the opposite party, and such is the usual practice.

When the attorney is changed during the progress of the action, notice of the substitution must of course be served on his opponent as heretofore. This notice must be in writing, and must give the residence of the substituted party, in compliance with the above rule. No particular form need however be observed. It need not be explanatory as to how the substitution was effected, the bare fact being all that is necessary to be shown. *Dorlon v. Lewis*, 7 How. 132.

### § 55. *Service by Mail.*

The above observations are applicable to those cases in which the parties or attorneys on both sides reside in the same place. When this is not the case, service by mail becomes admissible, except as regards process or papers to bring a party into contempt. Sec. 418.

The mode in which service by mail may be made, is thus prescribed by sections 410, 411, and 412:

§ 410. Service by mail may be made, where the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail.

§ 411. In case of service by mail, the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

§ 412. Where the service is by mail, it shall be double the time required in cases of personal service.

The cases in relation to service of this description are numerous.

In *Schenck v. McKie*, 4 How. 246, 3 C. R. 24, the following principles are laid down:

1. That such service must be made by the attorney himself, and that he cannot employ an intermediate agent.

2. That the paper must be posted at the residence of the attorney, and not elsewhere; properly addressed, and the postage paid.

3. That, if these requisitions be duly complied with, the service will be deemed regular, and the party to whom the notice is addressed, will then take the risk of the failure of the mail.

On these principles, a copy answer deposited by the agent of the attorney, in a post-office in a different town from that in which the attorney resided, was held not to be regularly served, and it was decided that the plaintiff had a right to enter up judgment in the meantime, and to disregard its subsequent arrival. Where, however, the papers, though unduly mailed, were actually received within time by the attorney for the opposite party, the service was held to be good. *Peebles v. Rogers*, 5 How. 208; 3 C. R. 213. The third of the above principles, as laid down in *Schenck v. McKie*, was fully sustained by the court, in the subsequent case of *Chadwick v. Brother*, 4 How. 283, in which a notice of adjustment of costs, and the adjustment under it, were decided to have been regular, when the former was posted by the defendant's attorney in due time; and this, notwithstanding such notice was not actually received by the plaintiff's attorney, until the day after such adjustment had taken place, owing to some irregularity on the part of the post-



office authorities. The same conclusion was come to in *Van Horne v. Montgomery*, 5 How. 238. In *Noble v. Trotter*, 4 How. 322, it was further decided that, where a copy of an answer had been posted by the defendant's attorney on the very last day allowed for its service, and after the mail had left on that day, in consequence of which the plaintiff's attorney did not receive it till two days after the time had expired, such service was nevertheless good: a judgment entered up, in the meantime, by the plaintiff's attorney, was accordingly set aside. The case of *Maher v. Comstock*, 1 How. 87, to the contrary effect, is overruled; and the cases of *Brown v. Briggs*, 1 How. 152; *Radcliff v. Van Benthuysen*, 3 How. 67; and *Jacobs v. Hooker*, 1 Barb. 71, under the old practice, are cited in the course of the decision, in support of the view so taken.

The same doctrine was also distinctly held in *Gibson v. Murdock*, 1 C. R. 103, with the addition that any party taking judgment, between the expiration of the time and the actual arrival of the answer, would take his order for such judgment "at his peril, and liable to be made irregular by its subsequently appearing that an answer had been previously served by putting it in the post-office;" nor would it seem that any specified limit will be imposed by the court on the period during which a plaintiff's remedy may thus be suspended, though probably, in an extreme case, relief might be extended. The authority of the last decision is confirmed by that in *Lawler v. The Saratoga Mutual Fire Insurance Company*, 2 C. R. 114.

A notice of appeal may be served, by depositing it in the post-office, on the last day allowed, so far as regards the opposite party. Such service on the clerk of the court will not, however, be in time, but will, on the contrary, be irregular. The provisions in relation to service by mail do not apply to the latter, by whom the notice must be actually received, within the time allowed by sec. 332. *Crittenden v. Adams*, 3 C. R. 145; 5 How. 310; 1 C. R. (N. S.) 21. Relief was, however, granted to the party, under sec. 173.

In *Dorlon v. Lewis*, 7 How. 132, it was held that the rules as to service by mail were applicable to the time to appeal as well as to other cases; and that where notice of a judgment had been so served, the party had double time wherein to appeal. An appeal taken on the thirty-first day after the entry of judgment was accordingly sustained, the notice of that judgment

having been served by mail, and not personally. As a general rule, however, it will not be safe to rely on this privilege in practice. The doctrine seems very doubtful. See subject considered and cases cited hereafter, under the head of Appeals.

In *Dresser v. Brooks*, 5 How. 75, it was held, that service of notice of justification, under sec. 341, when made by mail, must be for ten, not five days; although the effect of this construction will be to render service of that nature practically impossible, without an extension of the time by order.

Where the defendant's attorney has named his place of residence, on his notice of appearance, or otherwise as required by Rule 5, any papers served on him by mail must be directed in exact accordance with the address so given, or the service will be void. The words "place of residence" in the rule in question must, in such cases, be understood with reference to the post-office to which papers are to be directed. *Rowell v. McCormick*, 1 C. R. (N. S.) 73; 5 How. 337. Service of papers directed to another post-office in the same town was there held to be irregular. In *Montgomery County Bank v. Marsh*, 11 Barb. 645, affirmed by the Court of Appeals, 30th December, 1852, it was held, with reference to the service of notice of protest, that, where the notice had been addressed to a party at his principal place of business, it would be good, although he resided in another town in which there was a post-office, and his residence was nearer to that office, than to the place to which the letter had been directed.

The principle of the double time to be allowed under sec. 412, was applied to the case of an answer, served by mail, in *Washburn v. Herrick*, 4 How. 15; 2 C. R. 2; and the same was treated as an admitted principle, in *Cusson v. Whalon*, 5 How. 302, 1 C. R. (N. S.) 27, with reference to an amended pleading so served. The law laid down in these cases seems, however, to be questionable; and in several of the others above cited, the pleadings, though received after the expiration of the twenty days allowed to answer, were mailed within that period. Service of a pleading by mail, if posted within the twenty days, is unquestionably good; but whether forty days' time to answer, instead of twenty, may be claimed as of right in all cases where an answer may be served by mail, seems at least extremely doubtful. Sec. 143 is express that an answer must be served within twenty days after the service of the copy of the complaint—a

provision in direct conflict with the above, if the view taken in the two cases in question is to prevail. The true distinction would seem to be this: if the complaint is served with the summons, or personally, it would be most imprudent to defer serving the answer beyond the twenty days allowed by sec. 143. If, on the contrary, the summons is served alone, and the complaint is afterwards demanded, and served, not personally, but by mail, there seems no reason why the rule as to the allowance of double time should not then apply to the service of the answer. *Dorlon v. Lewis*, 7 How. 132, contains an "*obiter dictum*" to this effect, as follows: "Thus, the 143d section declares that a demurrer or answer must be served within twenty days after the service of the complaint. The time begins to run from the service. If, instead of serving the complaint personally, the plaintiff elects to serve it by mail, the time which thus begins to run against the defendant, is forty days, instead of the twenty days otherwise allowed."

The omission to pay the postage on a service of this nature would seem to be a fatal defect, and that the opposite party may in such case return the pleading, which will be a nullity. *Van Benthuyzen v. Lyle*, 8 How. 312.

Any irregularity in service, whether by mail or otherwise, will however be cured, if the paper in question is retained and acted upon. It should, in such case, be returned forthwith, and within the course of the same day, at farthest. See cases to this effect cited in a subsequent chapter, under the head of Proceedings before Answer. See, also, *Georgia Lumber Company v. Strong*, 3 How. 246; *Gilmore v. Hempstead*, 4 How. 153.

*Substituted Service in certain Cases.*—By the recent statute, c. 511 of the Laws of 1853, it is provided, that where it shall appear by the return or affidavit of any sheriff, deputy sheriff, or constable, authorized to serve any process or paper for the commencement, or in the prosecution of any action or other proceeding, that proper and diligent effort has been made to serve such paper, and that the defendant cannot be found, or, if found, avoids or evades such service, an order may be made authorizing service by leaving the paper at such defendant's house; or, if admittance cannot be obtained, by affixing a copy on the outer-door, and mailing another, directed to such defendant, in the post-office of the town in which he resides; on proof of

which, the paper is to be deemed served, and ulterior proceedings may be taken, as on personal service, but with liberty for the defendant to come in and make application for leave to defend, or for such other relief as the case may require.

This enactment being new, no reported case as yet appears under its provisions. The main object appears clearly to be with reference to the service of summons, and as a species of substitute for publication in certain cases; and the subject has already been more fully considered, and the provision cited *in extenso* under that head. At the same time, the statute clearly applies in terms to other proceedings, when taken against a defendant, and when the attempt at service has been made by an authorized officer. It seems, however, equally clear, that where the service is against a plaintiff, or where the attempt has been made by the attorney, or by his clerk or agent, in the ordinary manner, no additional facilities are given. It is not likely, therefore, that this provision will be much acted upon, as regards interlocutory applications.

### § 56. *Computation of Time.*

The computation of time in the different proceedings in a suit, as regards the service of notices, pleadings, and the performance of any conditions whatever, is thus specially provided for by sec. 407.

§ 407. The time within which an act is to be done, as herein provided, shall be computed, by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

In *Judd v. Fulton*, 4 How. 298, 10 Barb. 117, the practice of the courts, with reference to this section, is fully laid down as follows:

"The rule is well settled, that, in computing time, the first day, or the day when the time begins to run, is to be excluded. If the defendant had been required to do an act, within thirty days from the happening of an event, which had occurred on 26th August, he could have had the whole of the thirtieth day, that is, of the 25th of September, for that purpose. But, if he was prohibited doing an act until after the expiration of the thirty days, he could not do it until the next day, that is, the 26th of September."

A notice of trial, served on the 9th for the 19th of the same month, was held to be good, in *Easton v. Chamberlain*, 3 How. 412, and *Dayton v. McIntyre*, 5 How. 117, 3 C. R. 164.

In *Truax v. Clute*, 7 L. O. 163, the doctrine of the exclusion of Sunday was fully carried out in practice. Service of an affidavit on the 12th of March, under an order extending the time to do so to ten days from the first, was held to be sufficient; the 11th, in strictness the last of the ten days allowed, having fallen on a Sunday.

In *Whipple v. Williams*, 4 How. 28, it was even held, that in notices under any statute, for less than a week, Sunday should be excluded altogether from the computation. This case is, however, clearly overruled by *Easton v. Chamberlain*, above cited; *King v. Dowdall*, 2 Sandf. 131; *Bissell v. Bissell*, 11 Barb. 96; and *Taylor v. Corbiere*, 8 How. 385; in all of which it is held, that, where Sunday is an intermediate day, there is no rule or principle by which it is to be excluded from the computation; though otherwise, of course, when it is the last day of the period. In relation to the nullity of any legal proceedings on a Sunday, see *Pulling v. The People*, 8 Barb. 384.

With regard to the construction of statutes, the rule is however otherwise; and the act must be done within the time thus provided. Thus, where the last of the four days allowed to a justice for rendering his judgment expired on the following Sunday, a judgment rendered by him on the Monday morning was held to be void. *Bissell v. Bissell*, 11 Barb. 96. See also *Judd v. Fulton*, above cited.

In *Schenck v. McKie*, 4 How. 246, 3 C. R. 24, it was held that, where additional time to plead is granted by order, such additional time is irrespective of the date of the order itself, and does not commence to run until the time thereby extended would have expired, had no order been made.

The same principle as to the computation of time is also specially applied to the publication of legal notices by sec. 425, which provides that the time, in these cases, shall be computed "so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication." See this principle applied to the case of foreclosure by advertisement, in *Westgate v. Handlin*, 7 How. 372.

### § 57. *Papers in Cause—Marking Folios.*

The preparation of the papers, in a suit of whatsoever nature, is made a subject of special provision by Rule 41 of the Supreme Court, which runs as follows :

The attorney or other officer of the court who draws any pleading, deposition, case, bill of exceptions, or report, or enters any judgment exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof ; and all copies, either for the parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other. And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written ; and, if not so written, the clerk shall not file such as may be offered to him for that purpose.

There can be no question but that both of these regulations ought to be strictly observed, and that any party who neglects them does so at his peril, though such is too often the case. On the other hand, the wisdom of insisting on such an objection is somewhat questionable, as it is one of those which the court will infallibly disregard, unless the case be very flagrant indeed. See this disposition strongly evinced in *Sawyer v. Schoonmaker*, 8 How. 198, where a motion to set aside a complaint on this ground was denied, the defendant's affidavits being open to the same objection. It was also considered that the party objecting should have returned the papers, with the objections stated.

*Use of Copies, where Originals lost.*—Under sec. 422, a copy of any pleading or paper, lost or withheld by any person, may, by authority of the court, be filed and used instead of the original. An application will, of course, be necessary under these circumstances, and, unless the proceeding be merely formal, the opposite party will be entitled to notice, either in the usual form, or by way of order to show cause.

### § 58. *Consents, or Admissions.*

The giving of consents or admissions is a matter of frequent occurrence in the ordinary proceedings in a cause, when those proceedings are carried on between the opposite attorneys in a fitting and proper spirit. The following provisions are made upon the subject by Rule 37 of the Supreme Court :

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered ; or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

It will be observed that when such consent is reduced to the form of an order, such order must be entered with the clerk. The mere signature of the judge, and service of a copy on the opposite party, as in ordinary *ex parte* proceedings, will not accordingly be sufficient, without such actual entry. To give any general forms for consents or admissions, will of course be impracticable, as they must necessarily vary in each particular case, according to the circumstances. The only necessary remark appears to be, that the title of the cause ought properly to be prefixed in all cases. Where, however, a verbal agreement between the attorneys has been relied upon, and action taken by the opposite party in consequence of such reliance, the courts will not hold this rule to be applicable, but will compel the party who has obtained an advantage by means of the verbal stipulation, to perform it on his part. *Montgomery v. Ellis*, 6 How. 326.

### § 59. *Undertakings.*

In various proceedings in the course of a cause, undertakings by way of security, are required by the Code, or may become necessary. As a general rule, they must, under sec. 423, be filed with the clerk, unless the court expressly provides for a different disposition thereof, or unless such disposition be pointed out by the Code. See observations hereafter, in connection with the different proceedings to which these documents relate. All, of whatever nature, must, under Rule 72, be duly proved or acknowledged, in like manner as deeds of real estate, before they can be received or filed. The residence of the sureties should appear on the face of the undertaking. *Blood v. Wilder*, 6 How. 446.

### § 60. *Affidavits.*

The due proof of collateral matters, either with reference to points of form, or to the establishment of a title to collateral

relief, is a matter of continual necessity, pending the progress of an action. This proof is supplied by means of an affidavit, a proceeding of constant recurrence.

Where an affidavit refers either wholly or partially to any document, in relation to which the witness testifies, it is usual, and is clearly advisable, if not necessary, to identify that document, by marking it with some letter or number, and referring to that designation in the affidavit itself. If the proving of the document be a matter of importance, it will be prudent to add to that identifying mark, the initials or signature of the officer before whom the affidavit is taken, and, in special cases, an express reference to the affidavit itself, as thus: "This is the paper writing marked A., referred to in the affidavit of B. C., sworn this      day of      before me." The document thus becomes what is termed an exhibit, and may then be read in evidence with, and as forming part of the affidavit.

Several of the more formal of these documents will be found in different parts of the Appendix, in connection with the proceedings to which they relate. To give any precedent for statements of special facts in connection with particular cases, would of course be useless to attempt.

As a general rule, every affidavit, of whatever nature, must intelligibly refer to the proceeding in which it is made, or it will be bad altogether. The following provision on the subject is made by sec. 406:

It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title, or with a defective title, shall be as valid and effectual, for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

In *Pindar v. Black*, 4 How. 95, the principles of the above section were fully carried out, and an affidavit, entitled in a cause which as yet had no existence, and referring to an unknown party, designated by the title of the "real defendant," under the authority of sec. 175, was received, as sufficient to ground an order for the arrest of such party.

Where, however, an affidavit is made in an actually existent cause, the correct and proper practice will be to entitle it in that cause, in all cases, precisely as is necessary with reference to other proceedings therein. The name of the court, in particular, ought, in every instance, to be properly and correctly



stated. In *Clickman v. Clickman*, 1 Comst. 611, 1 C. R. 98, 3 How. 365, it was even doubted by the Court of Appeals, whether the entitling an affidavit in the wrong court, was not a fatal objection to its reception, notwithstanding the provision above cited. At all events, the mistake is one so easily guarded against, that no prudent practitioner will ever run the risk. In *Blake v. Locey*, 6 How. 108, it was held, on the contrary, that the objection as to an affidavit being wrongly entitled, is untenable. In *Bowman v. Sheldon*, 5 Sandf. 357, 10 L. O. 338, this latter view was supported. The test is whether the affidavit "refers intelligibly to the action or proceeding in which it is made." If, too, the fact appears collaterally, so that the defendant could not have been misled, the affidavit will be received. In that case the notice of motion was correct, and the wrong heading of the affidavit was clearly a clerical error; in *Clickman v. Clickman*, all the papers were incorrect, which distinction is taken by *Duer, J.*, in delivering his opinion. In the *People v. Dikeman*, 7 How. 124, it was considered, however, that the above section did not apply to proceedings on mandamus, and that, in such cases, an affidavit wrongly entitled, or, as was there the case, entitled in a suit, when in fact there was none pending, could not properly be received.

The affidavit, when drawn up and approved by the party making it, must be signed and sworn to by him, before a proper officer for that purpose. By sec. 49, art. II., title II., chap. III. of part III. of the Revised Statutes, 2 R. S. 284, the officers pointed out for this purpose are, "any judge of any court of record, any circuit judge, Supreme Court commissioner, commissioner of deeds, or clerk of any court of record;" and affidavits to be used in the Supreme Court may also, under that section, be taken by "any commissioner appointed for that purpose by the justices of that court."

Affidavits may also be taken out of the State, and within the United States, by commissioners of deeds, specially appointed for that purpose, under the powers of the act of 10th April, 1850, c. 270 of Laws of 1850; and this will, under ordinary circumstances, be found the most convenient way of obtaining them, in these cases. It may not be superfluous, though not strictly necessary, to remark, in this connection, that similar provisions exist in the laws of most, if not all, the other States in the Union; and also, with regard to proceedings in the

federal courts, that affidavits to be used in those States may be taken before commissioners, in this and others, appointed by the proper authority for that purpose. In relation to taking affidavits out of the State, see *infra*, at close of present section. Although great latitude is given, as above noticed, as regards the entitling of affidavits, the same is not the case with reference to the jurat.

When the affidavit is taken before a commissioner of deeds, it is essential that the venue should be stated, to show that he had jurisdiction to take it. If omitted, it will be a nullity. *Lane v. Morse*, 6 How. 394. The same rule, of course, holds good as to other officers whose jurisdiction to administer an oath is limited to as place.

The signatures both of the party and of the officer taking the affidavit are essential, and, without either, the document will be a nullity. Vide *Lumber v. Allen*, 2 Sandf. 648, 2 C. R. 15; *Graham v. McCoun*, 5 How. 353, 1 C. R. (N. S.) 43; *George v. McAvoy*, 6 How. 200, 1 C. R. (N. S.) 318, and various other cases subsequently cited under the head of Verification of Pleadings.

The mere omission of the date of the jurat was, however, considered not to be a fatal objection in *Schoolcraft v. Thompson*, 7 How. 446.

In cases where the affidavit cannot be taken before one of the officers before mentioned, or where it is required to be sworn in some foreign country, it may be taken before the judge of any court having a seal, under sec. 25, art. III., title III., chap. VII., part III. of the Revised Statutes, 2 R. S. 396. By the statute in question it is provided that the caption must, in this case, be certified by such judge; and his powers, and the genuineness of his signature, must be further certified by the clerk of the court, under its seal, in the manner specially prescribed. The above restrictions are, however, greatly modified, and great additional facilities given by the recent statute, c. 206 of 1854, Laws of 1854, p. 475, by which it is provided as follows:

§ 1. The officers authorized by the fifth and sixth sections of chapter three, part second, of the Revised Statutes, to take the proof and acknowledgment of deeds conveying real estate, and also any other consul or vice-consul or minister resident of the United States, appointed to reside at any foreign port or place, are hereby authorized to admin-

ister oaths or affirmations to any person or persons who may desire to make such oath or affirmation; and any affidavit or affirmation made before any such officer, and certified and authenticated as provided in the seventh section of said chapter, in respect to the proof and acknowledgment of a deed conveying real estate, may be read in evidence, and shall be as good and effectual, to all intents and purposes, as if taken and certified by an officer authorized to administer oaths, residing in this State; and no other proof of the official character of such officer, than the certificate annexed to such affidavit or affirmation, shall be required.

§ 2. This act shall take effect immediately.

*Evidence of Foreign Records, &c.*—With reference to the subject of collateral evidence in general, it may be remarked, in passing, that the practice in relation to the due proof of foreign records, &c., remains as heretofore. The law on the subject of the printed statutes or reports, and also to the unwritten law of other states or countries, is specially declared by sec. 426 of the Code, in accordance with the previous provision on the subject.

It may be a matter of interest to notice that affidavits, for the purpose of being used in the courts in England, may be sworn before a British consul, or vice-consul, under special statutory authority. See this subject noticed in 11 L. O. 192-224.

### § 61. *Motions and Orders—General Definitions.*

The above observations conclude that portion of this chapter in relation to the formal proceedings in a suit, as generally applicable.

Those following bear more peculiar reference to the subject of interlocutory applications therein; which applications must, in all cases, be presented to the court by means of a motion, and carried out, if granted, in the shape of an order. The following are the definitions of these proceedings, as given by sections 400 and 401 of the Code.

§ 400. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

§ 401. An application for an order is a motion.

## § 62. *Motions, General Classification of.*

An order is, as above stated, obtainable on motion only. Motions are again divisible into two grand classes, the enumerated, and the non-enumerated.

*Enumerated Motions.*]—With motions of this class, the present chapter has no concern, as they cannot properly be looked upon as of an interlocutory nature, but are, on the contrary, regular and most important proceedings in the progress of the case. As such, they will be treated of hereafter, and more especially under the head of Appeals.

An enumeration of the questions falling under this head, will be found in Rule 27 of the Supreme Court.

*Non-enumerated Motions.*]—By the same rule, it is laid down that “Non-enumerated motions include all other questions submitted to the court, and shall be heard at special term, except where otherwise directed by law.”

The large class of applications falling within the above definition, may be classified as,

1. Motions made on notice to the adverse party, and
2. *Ex parte* applications.

And the latter head is again subdivisible into  
Motions of course, and

Motions, *ex parte* at the first, but involving a subsequent argument upon notice; which latter species of proceeding is generally carried out by means of an order to show cause.

Before entering, however, upon these different heads, it may be as well to consider, in the first instance, the limits within which, and the officers by whom, motions in general may be entertained.

## § 63. *Where and before whom Motions may be made.*

The following are the general provisions of the Code on this subject, as contained in sec. 401 :

Motions may be made in the first judicial district, to a judge or justice out of court, except for a new trial on the merits.

Motions must be made within the district in which the action is tri-

able, or in a county adjoining that in which it is triable, except that, where the action is triable in the first judicial district, the motion must be made therein, and no motion can be made in the first district in any action triable elsewhere. Orders made out of court without notice, may be made by any judge of the court in any part of the State, and they may also be made by a county judge of the county where the action is triable, except to stay proceedings after verdict.

It will be convenient, and indeed necessary for practical purposes, to analyze and subdivide the provisions contained in the section above cited. The following distinctions should therefore be made between

1. Motions in the first district.
2. Motions elsewhere.
3. Motions made *ex parte* and out of court, and,
4. Opposed motions,

and which it will be important to bear in mind, in order to avoid confusion on the subject. The two former of these heads will be considered in this section, the latter in those following.

*First District.*—The peculiar characteristics of this district are that, as above—

1. All motions in actions there triable, must be made, and,
2. Motions in actions triable elsewhere cannot be made within that district. This rule however only holds good as regards contested applications: as regards those made “out of court, without notice,” a judge of the First District is not by the above section denuded of his general powers, wherever the action may be triable; on the contrary, they are expressly saved, and remain the same as before. An application for an order of this description, cannot be considered as “a motion” in this aspect of the question. The rule is otherwise, however, where notice in any shape is to be given to the opposite party. Under these circumstances, the application becomes a motion in the most extended sense of the word, and, as such, is embraced within the above restrictions. An order to show cause falls too within the same category, as, though *ex parte* in its inception, it becomes to all intents and purposes a motion, and a motion on notice, on the return of that order. It therefore cannot properly be granted, or, if granted, will in effect be nugatory. See these principles laid down by *Edwards, J.*, in *Baldwin v. City of Brooklyn*, unreported, but noticed in *Voorhies’ Code*, note to sec. 400.

In *Geller v. Hoyt*, however, 7 How. 265, it was held that the hearing of a motion, contrary to the above restriction, is not a question of jurisdiction, so as to render an order so obtained "*ipso facto*" void. Any Supreme Court justice, it was there ruled, had jurisdiction to hear the motion and to make the order, "although, if objection were made, he should not hear the motion; the order when made is the order of the Supreme Court." See also *Blackmar v. Van Inwager*, 5 How. 367, 1 C. R. (N. S.) 80; *Hempstead v. Hempstead*, 7 How. 8. It seems clear however that it would scarcely be prudent to rest too extensively on this doctrine, and that the only safe course in practice will be to comply strictly with the directions of the Code in this respect. The motion in *Geller v. Hoyt* was merely to correct a clerical error, and therefore was one in which there was no pretence of injury from the informality of the notice. Where however a question of real merits arises, there can be no doubt that an order obtained in defiance of this section, though possibly not void, would be clearly voidable, and voidable as of course, upon a proper application.

Another important characteristic of the First District is the increased facility for making motions; any applications of that nature, whether *ex parte* or contested, with the single exception of one for a new trial on the merits, being there cognizable by a judge, at chambers, or out of court.

In the Superior Court and the Court of Common Pleas, this principle is carried out to its full extent; and the judges, sitting at chambers, hear all motions, without distinction. In the Supreme Court, however, it is usual to confine the chamber business to the less important class of applications, and, as a general rule, to hear such as are opposed at the Special Term, for which purpose a special order has been made. A note, similar to a note of issue, is required to be filed in these cases. A regular calendar of the motions so noticed, is made out, and they are regularly called as they stand on that calendar.

A county judge has no power whatever to make an injunction order, or any other order, except mere orders of court in cases pending within this district. *Eddy v. Howlett*, 2 C. R. 76.

*Other Districts.*—In these districts, the facilities for making motions are increased as to the places, but diminished as to the mode, of making the application, as follows:

1. A motion may be made in any county within the district in which the action is triable; or, in any county, though in another district, (the first excepted,) which adjoins the county in which the venue is laid; but,

2. A motion, on notice, cannot be made before a judge, at chambers, or out of court, or otherwise than "at Special Term." See Rule 27. See, also, *Bedell v. Powell*, 3 C. R. 61, and *Schenck v. McKie*, 4 How. 246; 3 C. R. 24.

The affidavits in support of a motion, must show affirmatively that it is made in the proper district, or it will be denied. *Schermerhorn v. Develin*, 1 C. R. 13; *Dodge v. Rose*, 1 C. R. 123.

In *Peebles v. Rogers*, 5 How. 208, 3 C. R. 213, it was held that the words, "the county where the action is triable," include any county in which, under sections 123 to 125, the plaintiff is at liberty to have it tried. Under the Code of 1849, it was doubtful whether, when the place of trial was changed on special application, that change carried with it a change of venue for other purposes, and particularly with reference to interlocutory applications. (See this subject fully considered, and the cases cited, in a subsequent chapter, under that head.) Under the last amendment of sec. 126, the point is now no longer doubtful, it being there expressly provided that, "when the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed." This county will, therefore, now become the county of venue for all purposes, and will necessarily carry with it, where applicable, a change of the district for the purposes of interlocutory applications.

Where a summons had been served, stating that the complaint would be filed in a particular county, it was held that a motion for judgment for not serving a copy of the complaint, could not be made in another district, unless in a county immediately adjoining the county named. *Johnston v. Bryan*, 5 How. 355; 1 C. R. (N. S.) 46; *Inglehart v. Johnson*, 6 How. 80. Where, therefore, a county is situated in the middle, and not on the borders of a judicial district, the motion cannot be made out of the latter.

The same conclusion is come to in *Blackmar v. Van Inwager*, 5 How. 367; 1 C. R. (N. S.) 80. It is, however, held in that case, that, though irregularly made, as being in a wrong county, the order on a motion, by a judge of the Supreme Court, cannot be

treated as a nullity and disregarded. It is binding until set aside, and the party aggrieved must proceed accordingly. See also as to this last point, *Geller v. Hoyt*, 7 How. 265; *Hempstead v. Hempstead*, 7 How. 8.

Where a cross action had been brought, in respect of matter originally set up, by way of defence, in one pending in another district, it was held that the motion, for the purpose of compelling a consolidation of the two proceedings, could only be made in the cross action, and in the proper district in which such motion was cognizable; and an application of that nature in the original proceeding was accordingly denied, but without prejudice to its renewal in regular form. *Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1.

The above local limitations are, however, exclusively confined to cases where notice is required, and are not applicable to orders of course. These, as above noticed, may be made by a judge of the court in any part of the State.

*County Judge.*—This last class of orders may also, as provided by the section now in question, be made “by a county judge of the county in which the action is triable. In addition to which power, the following further authority is conferred on the county judge, by sec. 403:

§ 403. In an action in the Supreme Court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the Supreme Court at chambers, according to the existing practice, except as otherwise provided in this act. And, in all cases where an order is made by a county judge, it may be reviewed in the same manner as if it had been made by a judge of the Supreme Court.

In *Traver v. Silvernail*, 2 C. R. 76, it was considered that the time to make a case, on a motion for a new trial, could not be extended by a county judge, as involving a stay of proceedings after verdict. This case seems, however, clearly inconsistent with the provisions of sec. 405, which confer on the county judge the fullest powers of enlarging the time within which any proceeding in the action must be had, except only the time to appeal; and also with the general authority conferred by sec. 401. The powers of these officers to extend the time to answer, and also their general powers under sec. 29 of the Judiciary Act



of 1847, as to motions made without notice, which the court there held to be still subsisting, are fully asserted in *Peebles v. Rogers*, 5 How. 208, 3 C. R. 213; and, in *Otis v. Spencer*, 8 How. 171, it was even held that they possessed power to stay proceedings on a judgment entered on a referees' report, a distinction being drawn between such a judgment, and one entered on the verdict, which would clearly fall within the exception in sec. 401. See also *Sale v. Lawson*, 4 Sandf. 718; *Bank of Lansingburg v. McKie*, 7 How. 360; and *Conway v. Hitchins*, 9 Barb. 378. The above principle would seem, however, not to hold good with relation to *ex parte* orders, in cases triable in the first district. The order must there be made within that district, or by a judge of the court, if applied for elsewhere. A county judge has, it seems, no power to act under these circumstances. *Eddy v. Howlett*, 2 C. R. 76. Although the power of the county judge to make *ex parte* orders, except in cases triable in the First District, is thus almost unrestricted, it is equally clear that, where the application is in any manner contested, he has no jurisdiction at all. Thus, in *Merritt v. Slocum*, 3 How. 309, 1 C. R. 68, an *ex parte* order by a county judge, giving leave to defendants to file a supplemental answer, was decided to be void for want of jurisdiction, on the ground that he had no power to hear a motion, as such, in an action in the Supreme Court. Sec. 401 does not enlarge his powers; it only gives him authority to exercise those which, under "the existing practice," he possessed before the Code.

A similar conclusion was come to in *Otis v. Spencer*, 8 How. 171, where it was held that an order, directing what security should be given on appeal to the general term of the Supreme Court, and made by a county judge, was void for want of jurisdiction. The powers of the county judge do not extend to motions upon notice; *Peebles v. Rogers*, above cited; see also *Truax v. Clute*, 7 L. O. 163, and likewise *Schenck v. McKie*, 4 How. 246, 3 C. R. 24, in relation to orders of this nature in general.

In *Chubbuck v. Morrison*, 6 How. 367, it was considered that the county judge of one county, although that within which the applicant resides, has no authority to make an order, in an action triable in another. In *Peebles v. Rogers*, 5 How. 208; 3 C. R. 213, it was held, on the contrary, that sec. 401 of the Code does not take away the power given to those judges, by sec. 29 of

the Judiciary Act of 1847, in those cases where the motion is made without notice. The words, "the county where the action is triable," in section 401, include any county in which, under secs. 123, 124, and 125, the plaintiff is at liberty to have the action tried. The powers of the county judge do not extend, however, to motions upon notice.

The latter seems the sounder, as it is certainly the more convenient view, especially with reference to the saving of the former powers of the officer in question, effected by sec. 402, and the general authority with reference to orders for time conferred by sec. 405.

The jurisdiction of the county judge, in relation to these and other matters, has been already considered in the introductory chapters. As in all cases of a limited statutory authority, the presumption will lie against that jurisdiction, unless it be made clearly apparent. See *The People ex rel. Williams v. Hulbert*, 5 How. 446; 9 L. O. 245; 1 C. R. (N. S.) 75. The foregoing observations are of course applicable to the proceedings of the county judge, in actions in the Supreme Court. In those pending in his own jurisdiction, his powers are of course unfettered, and he possesses, within the limits of that jurisdiction, the same general authority as other judicial officers.

In *Griffin v. Griffith*, 6 How. 428, it was held that the act of the Legislature, conferring the powers of a county judge on the Recorder of Troy, Sess. Laws of 1849, p. 164, sec. 4, was unconstitutional, and all the acts of that officer, as such, void. If the principle of this decision be sustainable, it of course embraces the judges of any other cities or towns, who may claim or assume to exercise jurisdiction of this nature, by statute or otherwise.

### § 64. *Ex parte* Motions.

Proceeding in the order before laid down, the first point to be considered, is, as to the obtaining of *ex parte* orders, without notice; which, under sec. 401, may be made out of court, in all cases, by a judge of the court, in any part of the State. These are, as before stated, of two natures, viz.,—orders of course, and orders to show cause, *ex parte* in the first instance, but not final, unless on a failure to show such cause on the return.

The different circumstances under which orders of course are obtainable, and should be applied for, will be considered here-

after, under the heads of the different proceedings to which they refer. No notice, of any description, is required; nor is an affidavit necessary, in any of these cases; unless, of course, some independent fact requires to be proved, as a condition precedent to granting the order.

No particular form is necessary, in relation to orders of this description. Where separately made, the title of the cause should, of course, be prefixed; where made on affidavit, an usual practice is to add the order at the end of that paper, to which, if approved, the judge affixes his signature. A copy of the order, and also of the affidavit, on which it is grounded, where such is the case, must then be served upon the opposite party, whereupon the proceeding is complete.

An application for a writ of assistance, by the purchaser under a judgment of foreclosure, and who has obtained his deed, and been ordered to be let into possession, is an *ex parte* order, to which the applicant is entitled as of right, without notice, and without power for the adverse party to oppose. A grantee of the purchaser is similarly entitled. *New York Life Insurance and Trust Company v. Rand*, 8 How. 35.

Orders of this description need not, in general, be entered, nor need the affidavits be filed with the clerk; (*Savage v. Relyea*, 3 How. 276; 1 C. R. 42; *Vernam v. Holbrook*, 5 How. 3;) though it may often be more prudent to do so.

That no appeal lies to the general term, from the decision of a judge, granting or refusing an *ex parte* order, was held in *Savage v. Relyea*, above cited.

Orders made at chambers, upon notice, are, however, appealable. *Nicholson v. Dunham*, 1 C. R. 119.

A number of *ex parte* proceedings are connected with the granting of provisional remedies, of different descriptions. They are all of a special nature, and must be grounded on affidavits of the circumstances; the details of which, and of the nature of such proceedings in general, will be separately considered hereafter, under their proper heads, and forms given in the Appendix.

An application to a judge to vacate or modify his own order, under sec. 324, is also a proceeding of this description. See this subject hereafter considered under the head of Appeals.

An application to remove a mere technical difficulty in a special proceeding, is addressed to the discretion of the court,

and may be made either *ex parte* or on notice, as the court may direct. *In re Patterson*, 4 How. 34.

To a certain extent, the taking of an order by consent, may be looked upon in the light of an *ex parte* motion. The mode of proceeding in this case will be found considered in a subsequent section of this chapter, under the head of Orders.

*Extension of Time.*—Special provision is made as follows, by sec. 405, in relation to a large class of orders of this description, viz., those in which the time for taking different proceedings is extended:

§ 405. The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or if the action be in the Supreme Court, by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

By sec. 401 it is, however, provided that "No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except upon previous notice to the adverse party."

It has been held that the latter provision is not applicable to an order, enlarging the time to make a case, or bill of exceptions, when made by the judge who tried the cause. *Thompson v. Blanchard*, 1 C. R. 105. Nor need such last-mentioned order be grounded on an affidavit, but may be made by such judge on his own knowledge. If, however, an order of this description be made by another judge, it must then, of course, be grounded on an affidavit of the facts, and a copy of that affidavit must be served in the usual manner. *Same case*.

In *Mitchell v. Hall*, 7 How. 490, it was doubted, however, whether an order, granting an indefinite extension of time, until the decision of the court had been given on a bill of exceptions, was good for the excess beyond twenty days, though made in effect by the judge who tried the cause, that order having been made nearly two months after the trial, and apparently *ex parte*. The opinion is, however, doubtfully expressed, nor does the point appear to have been directly raised, whilst the remedy is clearly indicated in the following sentence: "The safest and best practice undoubtedly is, when the first order is applied for,

to make it an order of the court, which will give it a vitality commensurate with the necessities of the case."

An order, extending the time for the above purpose, beyond the twenty days, may, it would seem, be made by any judge other than the one who tried the cause; and, if made, will be good, as regards the extension of time. See also *Mitchell v. Hall*, *supra*. It will, however, be void, in so far as proceedings are thereby stayed, and may be so far disregarded. *Huff v. Bennett*, 2 Sandf. 703; 2 C. R. 139. It appears clear, however, that an order extending time to make a case cannot be granted *ex parte*, after the time originally allowed for that purpose has run out. The party must then apply to the court on notice. *Doty v. Brown*, 4 How. 429; 2 C. R. 3; *Stephens v. Moore*, 4 Sandf. 674. *Oakley v. Aspinwall*, 1 Sandf. 694, is authority that the mere making a case, or bill of exceptions, is not, of itself, a stay of proceedings, unless an order be obtained.

In *Langdon v. Wilkes*, 1 C. R. (N. S.) 10, it was held that any number of orders, staying different proceedings, might be made under sec. 401; though, collectively, they might stay the proceedings for more than twenty days. See, however, decisions below cited. In the same case, it was held that the affidavits on which a mere stay is granted, need not accompany the order. Such order does not necessarily enlarge the time within which the party obtaining it must take proceedings, on his part, and the Code only requires the affidavit to be served, where that is the case.

The point as to whether the time within which an appeal may be taken, can or cannot be enlarged, has been the subject of considerable discussion; though it may now be considered as settled, that it cannot. See cases cited hereafter, under the head of Appeals.

The point, as to the extent of the power of the Court to grant *ex parte* extensions of time to answer, or successive orders to stay proceedings in relation to the same matter, has remained doubtful, and been the subject of much discussion. In *Wilcock v. Curtis*, 1 C. R. 96, it was considered that the twenty days' restriction, above noticed, did not apply to an order extending the time to answer, on the ground that such an order was not, in effect, a stay of proceedings. This view seems very questionable. A practice, however, sprung up and became very prevalent, of obtaining a series of separate orders, each extending the time to

answer for twenty days, and thus, in effect, gaining, by a succession of *ex parte* proceedings, a longer period than that allowed as above, each particular order, nevertheless, when obtained, not transcending that limitation. See, too, a similar view as taken in *Langdon v. Wilkes*, above cited.

This practice has, however, been distinctly disapproved, and a second application for time has been, in subsequent cases, denied, on the ground that, in effect, it was an indefinite extension of time beyond the twenty days, and could only be granted on notice. *Anon.*, 5 Sandf. 656; *Sales v. Woodin*, 8 How. 349. These cases may be considered as settling the question, in opposition to the previously prevalent practice, and the views there taken seem, on examination, to be unanswerable.

Although, in effect, a stay of proceedings may be actually intended to apply to a shorter period than twenty days, it cannot be applied for in an indefinite form. An indefinite stay of proceedings until the hearing of a motion, cannot be granted *ex parte*, or otherwise than on notice, or order to show cause. *Schenck v. McKie*, 4 How. 246, 3 C. R. 24. See also *Mitchell v. Hall*, 8 How. 490, above cited.

To be obtainable *ex parte*, an extension of time must also be applied for, before the applicant is actually in default. If delayed until that is the case, it cannot then be obtained, unless upon notice, or order to show cause. *Stephens v. Moore*, 4 Sandf. 674. See *Doty v. Brown*, *supra*.

An agreement, signed by a plaintiff in person, extending the time to answer, on payment of part of his demand, was held to be a valid and binding extension, and a judgment, taken by his attorney within the extended period, though apparently without knowledge of the extension, was set aside as irregular in *Braisted v. Johnson*, 5 Sandf. 671.

The effect of an extension of time to answer, however made, is to waive all right to object to the complaint, unless expressly reserved. *Borman v. Sheldon*, 5 Sandf. 677; 10 L. O. 338.

It would seem from *Graham v. McCoun*, 5 How. 353, 1 C. R. (N. S.) 43, that the omission of the jurat on the copy of an affidavit, served under the above provisions, will not render the service irregular; but no prudent practitioner will ever omit to include it, so as to make the copy a complete one.

### § 65. *Order to show Cause.*

The other *ex parte* proceeding above alluded to, is the order to show cause, which, though obtainable out of court, and without notice in the first instance, is, in fact, only another form of giving notice to the opposite party, of an adverse application. It is peculiarly applicable to those cases in which a shorter period of notice, than that required in ordinary motions, is desirable, and, as such, is specially provided for by sec. 402; or, where an immediate stay of proceedings pending the discussion of an interlocutory question is wished for. It must, of course, be served precisely in the same form as an ordinary notice, and the service proved in the same manner.

In these cases, the affidavits on which the application is grounded, should, in the first instance, be drawn up, and application made thereon to a judge, out of court. A sketch of the order to be asked for, will be found in the Appendix.

In the first district, that order may be made returnable before a judge, out of court; in the others, it must be so at a special term, within the limits before prescribed in relation to motions in general; and, if a stay be asked for, the return should, in these cases, be within twenty days, or, under the authority of cases above cited, the stay may be void, as granted out of court without notice.

In relation to applications in this form, in order to bring on the motion at an earlier period than according to the ordinary notice, see *Merritt v. Slocum*, below cited. In the New York Common Pleas the following restriction is imposed upon applications, with the latter view, by Order of March 24, 1850:

Ordered, that orders to show cause on non-enumerated motions will not hereafter be granted, except upon affidavit, showing the necessity of making the time of notice shorter than is required in the Code; and, where such order is returnable on any other day than the first day of the special term, the reason therefor must be stated in the affidavit on which the motion is founded.

In that court, therefore, attention must be paid to the above requisites, in framing the affidavits where necessary; in the others, this is not essential.

The argument, on the return of the order to show cause,

assumes substantially the shape of that upon an ordinary motion, and is disposed of as such.

It is now expressly provided by Rule 25, as amended on the last revision, that, where the motion is for irregularity, the irregularity complained of must be specified; see below, under the head of Notice; this of course holds good as to an order to show cause.

It is equally essential, that the papers intended to be read on the motion, should be distinctly referred to on the face of the order itself. See observations on this head in the succeeding section.

This form of proceeding, though throughout unquestioned in practice, was not formally recognized in the Supreme Court Rules of 1849. It is now expressly provided for, and placed on the same footing as a motion, by the recent amendment in Rule 25, formerly 28.

In relation to an order to show cause, obtained under the provisions of the Revised Statutes, in certain cases of abatement of suit, see *Williamson v. Moore*, 5 Sandf. 647. See also *infra*, under head of Revivor.

### § 66. *Notice of Motion.*

We now proceed to the consideration of motions in general, brought on in the ordinary form, and on the usual notice.

The period for which notice must be given is thus prescribed by sec. 402:

§ 402. When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

The service must, of course, be made and proved in the usual manner; the papers served with the notice, being also expressly referred to in the affidavit. See heretofore, under the head of Service.

In *Merritt v. Slocum*, 6 How. 350, the words "court or judge" in the foregoing section, were held to mean the court or the judge before whom the motion is to be heard; and it was decided that another judge, sitting at chambers, cannot make an order to show cause of the above nature. If the hearing is to be out of court, the judge who is to hear the application, and he alone, may, if he thinks right, make such an order; but, if



the application is not to be made out of court, then no judge, out of court, possesses the power to do so.

Provision is likewise made in relation to the noticing and hearing of motions, by Rules 32 and 33 of the Supreme Court, as follows:

**RULE 32.**—Non-enumerated motions, except in the first district, shall be noticed for the first day of the term, or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, unless sufficient cause be shown, (and contained in the affidavits served,) for not giving notice for the first day.

**RULE 33.**—Non-enumerated motions made in term time, at a general term, will be heard on the first day, and Thursday of the first week, and Friday of the second week of the term, immediately after the opening of the court on that day.

Motions in criminal cases may be heard on any day in term.

The notice of motion must be served on all parties to the suit, who have any interest in the result of the application; and copies of the affidavits and papers, on which such motion is proposed to be made, must be served with the notice. Papers omitted to be so served cannot be read. Where, however, a motion is made on the pleadings alone, this is not necessary, but a simple reference to those pleadings will be all that is required; *Newbury v. Newbury*, 6 How. 182. See also *Darrow v. Miller*, 5 How. 247; 3 C. R. 241. Nor will formal proof of the existence of the suit be necessary, that fact being presupposed by the pleadings themselves. See same cases, overruling *Osborn v. Lobdell*, 2 C. R. 77. In all instances, however, it is essential that the papers intended to be used on the motion should be distinctly and positively indicated on the face of the notice, or order to show cause; a vitally essential precaution, and one that should never be omitted under any circumstances, as the adverse party has a clear and indisputable right to object to the reading of any paper not so referred to, expressly, or by unavoidable implication; and, if taken, that objection must prevail. Where any exhibits are proposed to be read or referred to, they should be indicated in like manner, and, if not communicated already or known to the opposite party, copies should be served.

The exception as to the First District was only formally in-

serted in Rule 33, on the last revision. Before that amendment it was held, that that rule, as it stood before, was inconsistent with sec. 401 of the Code, and this view was acted upon by the New York Common Pleas in *Lakey v. Cogswell*, 3 C. R. 116.

Although, as regards the other districts, as a general rule, a notice of motion should be given for the first day of term, yet, provided a sufficient excuse appears upon the moving papers, it may be given for a later day. *Whipple v. Williams*, 4 How. 28.

It is now expressly provided by Rule 25, as amended on the last revision, that, "When the motion is for irregularity, the notice or order shall specify the irregularity complained of." Previous to this amendment, the point was a contested one, it having been held in *Burns v. Robbins*, 1 C. R. 62, and *Blake v. Locy*, 6 How. 108, that, where the errors relied on were sufficiently indicated on the accompanying papers, it was not necessary to state them upon the notice itself; the contrary conclusion being come to in *Coit v. Lambeer*, 2 C. R. 79. The rule, as now amended, settles the question, and the course recommended in the former edition of this work has now become imperative.

The above rule was acted upon, and a motion on a notice defective in the above particular denied, in *Bowman v. Sheldon*, 5 Sandf. 657, 10 L. O. 338. See also, *Whitehead v. Pecare*, 9 How. 35, and, likewise, *The Broadway Bank v. Danforth*, 7 How. 264, holding that when a party returns a pleading on the ground of an insufficient verification, he is bound not merely to do so, but to point out the alleged irregularity. A party moving on merely technical grounds, must see that his own papers are not open to the same objection as his adversary's; or his application may be refused, on that ground. *Sawyer v. Schoonmaker*, 8 How. 198.

A party moving on the ground of irregularity must apply too at the earliest opportunity; he will not be held, however, guilty of laches in not moving at a special term connected with a circuit, and at which it is not certain that his motion can be made; *Reddy v. Wilson*, 9 How. 34.

The entitling the notice of motion in a wrong court is a fatal defect, and one that cannot be amended; *Clickman v. Clickman*, 1 C. R. 98; 3 How. 365; 1 Const. 611. A contrary view was held in *Blake v. Locy*, 6 How. 108. See prior observation

on the subject of the entitling of affidavits, which came into question in the same cases. *Bowman v. Sheldon*, there cited as to the latter point, does not apply to this branch of the subject, and the authority of *Clickman v. Clickman* is, of course, of greater weight. The objection is one that may always be obviated.

In *Northrop v. Van Dusen*, 3 C. R. 140, 5 How. 134, it was held that, where costs are omitted to be asked for in the notice of motion, they cannot be given by the court; the usual words asking for such further order, &c., as the court may deem meet, are not sufficient to carry them. This easy precaution should therefore never be omitted.

In *Bates v. James*, 1 Duer, 668, it was held that a notice of motion, once given, cannot be afterwards countermanded by the party who has given it, so as to deprive his adversary of the right to attend on the day specified, and have the application dismissed with costs. In practice, however, this is rarely insisted on, when the countermand is made in due time, and with good faith.

As a general rule, the notice of motion must be served upon every party who has been served or has appeared in the case, and is in any wise interested in the application. It would seem, however, that, as regards parties who have been merely served with process, and have not appeared, this rule will not be insisted upon. Thus, where two defendants had been originally served with process, but neither had appeared, and one of those defendants had subsequently removed from the State to parts unknown, it was held that service on the latter was not necessary, and an order, obtained by service on the other, was sustained by the Court of Appeals, in *Suydam v. Holden*, Court of Appeals, 7 Oct., 1853.

A notice of an application to exonerate the sheriff as bail, signed by a person neither an attorney, nor a party to the action, and not authenticated, so as to apprise the plaintiff distinctly that the sheriff himself was seeking relief, was held not to be sufficient notice of a motion on the sheriff's behalf, in *Buckman v. Carnley*, 9 How. 180.

A form of notice of motion will be found in the Appendix. It contains only the formal portions of that proceeding. The part by which the relief itself is asked, will of course vary according to the nature of that relief, and, as such, will be noticed

hereafter as applicable to each individual proceeding. As a general rule, the demand of relief, where grounded on, or arising out of any section of the Code, or any other statutory provision, should follow the exact wording of that provision, as far as practicable. The demand for further or other relief should, under no circumstances, be omitted. It should not, however, be relied on, to sustain matters extrinsic to those specially called for. Thus, the granting a feigned issue, as a matter of further relief on a motion to set aside a judgment, was considered as matter beyond the scope of the general demand for further relief, in *Mann v. Brooks*, 7 How. 449. See likewise *Bellinger v. Martindale*, 8 How. 113, as to leave to renew a motion already decided.

In relation to the general incidents of motions, and under what circumstances they may be held to be noticed, prematurely on the one hand, or too late on the other, and also in what cases the court will, or will not interfere on interlocutory application, see hereafter, in the course of the present chapter, under sec. 68.

Motions, in general, are grounded either on the papers or proceedings in the cause, or on voluntary affidavits. Where, however, the evidence of involuntary witnesses is essential, that testimony is procurable under the special statutory provisions mentioned in sec. 69 of this chapter, to which the reader is accordingly referred.

### § 67. *Petitions.*

The usual mode of making motions is on affidavit. They may, however, be grounded on petition. Rule 39 of the Supreme Court, provides on this subject as follows:

Motions in actions, made after the commencement thereof, may be founded upon petition duly verified, or by affidavit, or by both, at the election of the party making such motions, except when otherwise provided by law.

To the ordinary applications in the progress of a suit, the proceeding by petition is inapplicable, and the motion should, in these cases, be grounded either on the pleadings or proceedings themselves, or on affidavit, as before mentioned. In those

where the relief is applied for under a special statutory proceeding, petition is, on the contrary, the proper form. Under certain circumstances, it may also be proper to make application in this form in the course of a suit, as, for instance, when such suit is sought to be continued or revived against new parties, under sec. 121. See *Williamson v. Moore*, 5 Sandf. 647, prescribing this course as indispensable, where the application was made in a suit commenced before the Code. The relief asked for in such a case being of a direct, and not of a collateral nature, cannot be properly obtained on a proceeding of a collateral description. The circumstances on which the court acts ought, on the contrary, to appear directly on the document itself by which relief is sought; and a petition, filed with the order, and forming as it were a component part of it, is accordingly the more proper form in these and similar cases. The petition, when prepared, should be verified by affidavit of the petitioner, wherever practicable, or, if not, then by that of his agent, acquainted with the facts of the case; the reason why such verification is made by the agent, and not by the principal, being satisfactorily shown, precisely as hereafter prescribed in relation to the verification of a complaint. A copy of the petition, thus verified, and of any collateral affidavits, if any, on which the application is proposed to be grounded, should be served on the adverse party, or, if the petition arise out of matter extrinsic to the pleadings as they stand, then, upon every party interested in, or sought to be affected by the relief to be granted, the usual form of notice of a motion grounded on that petition, being also served at the same time.

In *Dole v. Fellows*, 5 How. 451, 1 C.R.(N.S.) 146, it was held that an order for discovery of books, &c., under sec. 388, can only be applied for on petition: overruling a dictum in *The Exchange Bank v. Monteath*, 4 How. 280; 2 C. R. 148, to the contrary effect. See also *Follett v. Weed*, 3 How. 303, 360; 1 C. R. 65. See this subject hereafter considered under the head of proceedings between issue and trial, the point being clearly settled, that petition is the only proper form of application in such cases. See, likewise, *Lovell v. Clarke*, 7 How. 158, there cited.

Special provision is made by Rule 38 of the Supreme Court, in relation to the framing of orders on petitions, to the effect that such petition must be referred to in the order, without setting forth the tenor or substance unnecessarily. To do so

would be clearly a work of supererogation, as the petition should in all cases be filed with the order, and, as such, explains itself. The same rule provides, that orders or judgments granted on petitions, where no complaint is filed, may be docketed as judgments, where the payment of money is directed, or the title to property affected by them.

The formal constituents of a petition are unaffected by the Code or Rules, and remain as under the old practice. Those constituents may be gathered, however, from the forms in the Appendix, under the heads of Appointment of Guardian and Discovery. The petition should commence with the title of the cause, or a description of the matter in which it is presented. It must be duly addressed to the court applied to, as thus:

To the Supreme Court of the State of New York:

The petition of A. B. (the above-named plaintiff, or defendant, if such be the case, "*mutatis mutandis*,") respectfully sheweth.

The allegations on which the court is called upon to interfere then follow, and the document concludes with the prayer for the relief sought, commencing with the words, "Your petitioner, therefore, prays, &c." This document should be signed, in all practicable cases, by the party petitioning, in the presence of a witness. The party signing must also verify it by affidavit; and his signature must likewise be proved by the affidavit of the witness thereto, to be further subjoined. See forms of these affidavits and general sketch of petition as above, as given in Appendix of Forms.

### § 68. *Opposed Motions—where Cognizable.*

Under this denomination will fall all applications whatsoever, of which notice has previously been given under the provisions before noticed; and, likewise, the whole class of orders to show cause, on their arriving at that stage of the proceeding at which cause is to be shown, pursuant to the terms of the original order.

*Chambers or Special Term.*]—In all other districts, except the First, motions of this description, as noticed in a previous sec-

tion of this chapter, are only cognizable by a judge sitting at special term, and not otherwise. In the First District, however, it would seem that, under sec. 401, any motions whatever can be heard out of court or at chambers, with the one exception of an application for a new trial on the merits. A more restricted practice has, however, been adopted, one of the distinctions drawn, being that between interlocutory applications, and those which involve a decision of the whole case, with the one exception below noticed. Thus, in *Aymar v. Chase*, 1 C. R. (N. S.) 330; 12 Barb. 301, it was considered that an order granting judgment for want of a reply could not be made at chambers. The only case, it was there held, in which a judgment can be granted by a judge out of court, is, on an application under sec. 247, in respect of a frivolous pleading, where the power is expressly given to apply to a judge, either in or out of court. "In all other cases judgment can be rendered only by the court, when sitting as such, and not by a judge at his lodgings, in the street, or even in chambers."

The provisions authorizing motions to be heard out of court, as above, do not either seem to extend to proceedings which are not strictly actions under the Code. Thus, *In the matter of H. Hicks's Will*, 4 How. 316, 2 C. R. 128, it was decided that the provisions of section 401 do not extend to authorize motions to be heard at chambers, in suits existing at the time the Code passed, nor in special statutory proceedings, as in an appeal from the Surrogate's Court, the point there at issue.

A question of this nature would seem, however, not to be positively jurisdictional, so as to render the order *ipso facto* void. See *Geller v. Hoyt*, 7 How. 265, before cited.

With reference to the applications specially excepted by the Code from the class of motions that may be made out of court, in *Duel v. Agan*, 1 C. R. 134, it was held that a motion in arrest of judgment cannot be made at chambers. It is in the nature of a motion for a new trial, and must be made to the court accordingly.

In the Supreme Court for the First District, the practice prevails to hear all seriously contested motions at Special Term, and, as a general rule, to take cognizance at chambers of those only which are unopposed, or which do not require any lengthened discussion. For this purpose, a regular calendar of motions is accordingly made out each month, and the motions

entered on that calendar are called and brought on in their order accordingly. A note of the motion should accordingly be filed with the clerk in these cases. The motion is then placed on the Special Term calendar, and brought on in due course. In the other courts this rule does not obtain.

In the court in question, every Saturday in term is set apart for the hearing of motions so noticed for the Special Term, and other days are occasionally appointed for the purpose.

*Superior Court and New York Common Pleas.*—In the New York local courts, greater facilities are afforded for the hearing of motions. In the Common Pleas, under the Rules of June 1848, and 29th November 1851, motions that may be made out of court, and chamber business, will be heard before a judge at chambers daily, between 10 and 12 A.M., in the months of January, February, April, May, June, September, October, and December; and from 10 to 11, during the General Term, in March, July, and November. Special terms for motions are also, under the provisions of the Rules of November 1851, to be held on the first Mondays of the months first above referred to, and likewise, (except only as regards the hearing of motions for new trials,) on the first Mondays of March, July, August, and November. If the first day of term should not suffice for these purposes, the hearing of such applications may, of course, be continued at the discretion of the court until those noticed for the term have been duly disposed of. Appeal motions are to be heard on the Saturday of the General Term. See Rule 4 of 1848.

In the Superior Court, the arrangements for the hearing of motions are, under the late rules, still more comprehensive. The following provisions in relation thereto are made by Rules 5, 6, and 7:

RULE 5. — Non-enumerated motions will be heard by one of the justices, at the Special Term room and the chambers, daily, at 10 A.M., throughout the year; except on New-Year's Day, Good Friday, the Fourth of July, the day of the Annual Election, Thanksgiving Day, and Christmas. For such motions, and for the purpose of making all necessary orders, and giving judgments in causes under chapter first of title eight of the second part of the Code, a special term will be held, every day during the vacations, at 10 o'clock A.M.

RULE 6. — The justices designated to hold the General Terms will



attend at chambers, daily, during their respective terms, from 10 to 11 A. M., to dispose of *ex parte* applications, and of non-enumerated motions, in which all the parties are present or represented. All applications for *ex parte* orders, and for a judgment upon failure to answer, during the General Terms, must be made before 11 o'clock A. M.

RULE 7. — Appeals from all orders made on non-enumerated motions, will be heard on each Saturday during the General Terms, at 11 o'clock, A. M., and must be noticed for that time.

The court, at the conclusion of the June Term, will appoint General Terms, for hearing such appeals only, to be held during the vacation.

*General Term.*—It will be seen that in the above rules special provision is made for the hearing of appeal motions by the General Term, and that, in both tribunals, the Saturday of each week is set apart for that purpose.

In the Supreme Court the provisions for the hearing of motions of this description are less summary. Under Rule 36, non-enumerated motions to the General Term are, as regards the Supreme Court in general, without reference to any peculiar district, to be heard on the first day of term, or on the Thursday of the first week, or Friday of the second week, immediately after the opening of the court.

The class of applications which fall within the cognizance of the General Terms of the different courts, consists of appeal motions, as above noticed; of motions relative to appeals from judgments, and the proceedings connected therewith; and of some few other matters, chiefly of statutory jurisdiction, such as applications in relation to the misconduct of an attorney or counsel, &c. The powers of the judges sitting at General Term are, however, if they choose to extend them, of wider scope, as was asserted in *Drake v. The Hudson River Railroad Company*, 2 C. R. 67, with reference to the granting of an injunction. They will rarely, however, be disposed to assume jurisdiction in this respect. It may be safely stated that, as a general rule, interlocutory applications are primarily cognizable by a single judge only, at Special Term, or at chambers, according to the circumstances.

*General Remarks.*—As a matter of course, the regulations in relation to the hearing of motions, rest peculiarly within the discretion of the court, and are changeable, from time to time,

according to the state of the business, or the convenience of the judges in any peculiar district.

Motions in criminal cases may be brought on any day in term; and certain other cases, in which the rights of the public are involved, are also entitled to precedence, as will be hereafter noticed. The hearing of motions in the Court of Appeals will be considered, in the chapters devoted to the consideration of the practice of that court.

By sec. 404, the following provision is made with reference to the possible inability of the regular judge to hear a motion, at the time for which it is noticed.

“When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and, at the time fixed for the motion, he is absent or unable to hear it, the same may be transferred by his order to some other judge, before whom the motion might originally have been made.”

The same contingency would also seem to fall within the previous provisions made in sec. 27, with reference to justices of the Supreme Court:

“The judges shall at all reasonable times, when not engaged in holding court, transact such other business as may be done out of court. Every proceeding commenced before one of the judges in the First Judicial District, may be continued before another, with the same effect as if commenced before him.”

### § 69. *Opposed Motions—Course on Hearing, and Incidents of Papers used on.*

The moving party, on opening his motion, can only read the affidavits and papers served with his notice or order to show cause, (Rule 32,) or those previously served, and therein referred to. He cannot introduce evidence, of his intention to rely on which he has not given due notice to his adversary. In general the evidence so used is voluntary. The case of an unwilling witness is however specially provided for, and the testimony of a party standing under such circumstances, is procurable for the purposes of a motion, under special provisions contained in the Revised Statutes, as regards the Supreme Court, and under special enactment for that purpose in the New York local jurisdiction.

The provision in the Revised Statutes will be found at 2 R. S. 554, secs. 24 and 25, and runs as follows :

§ 24. When there shall be any motion or other proceeding in the Supreme Court, in which it shall be necessary for either party to have the deposition of any witness, who shall have refused voluntarily to make his deposition, the court may direct a commission to be issued to one or more persons, inhabitants of the county in which such witness resides, to take his testimony.

§ 25. Such witness may be subpoenaed to attend and testify before such commissioners, in the same manner as before referees, and with the like effect ; and obedience to such subpoena may be enforced in the same manner.

The statutory provision in relation to similar proceedings as regards the Superior Court, is contained in sec. 3, chap. 276 of Laws of 1840, (see 2 R. S. 316, in third edition,) and runs thus :

When there shall be a motion or proceeding in the said Court, in which it shall be necessary for either party to have the deposition of any witness, who may be within the jurisdiction of said court, and who shall have refused to make his deposition voluntarily, the said court may issue a summons, requiring such witness to attend before a judge thereof, to make his said deposition ; and obedience to such summons may be enforced, as in case of a subpoena issued by said court.

By sec. 4 of the same statute, the above powers are likewise given to the New York Court of Common Pleas in like manner, and to the same extent, as to the Superior Court.

The same remedy is therefore obtainable in all the courts of higher jurisdiction, though with some differences in form. In all those courts, the motion must be grounded on an affidavit to the same effect, viz., that the deposition is necessary, and that the witness has refused to make it; the fact that such witness is within the jurisdiction being further superadded, when the application is in the Superior Court or Common Pleas. The form of order to be applied for is, however, different in the different jurisdictions, the examination taking place before a judge in the New York tribunals, and before special commissioners in the Supreme Court. In the latter, a subpoena must be issued and served on the witness; in the former, the order itself constitutes the process on which his attendance is compellable. In

both, the usual witness's fee ought, as a precaution, to be paid to him at the time of service. The examination then proceeds in the ordinary form of an examination "*de bene esse*," or of that of a party before trial under the Code, and the deposition, when taken, may be used on the motion, and should be filed in like manner. Forms of the affidavit and order, as applicable to both classes of tribunals, will be found in the Appendix. The party opposing the motion, is entitled to use the papers served by his adversary, the pleadings, and any previous proceedings in the action, and likewise any papers previously served by him upon his adversary, which bear directly upon the question at issue. He is also entitled to bring in, and to read on the hearing, any affidavits which he may consider necessary, and may have obtained, in order to rebut the case made by his adversary, or to strengthen that made out by him in opposition, and likewise any exhibits there referred to. It would seem also that, if the judge grant the permission, *vivâ voce* evidence may be introduced on a motion, though the practice would be highly inconvenient, and is rarely, if ever, adopted. In general, matters suddenly arising in the course of the hearing of a motion, are put on the spot into the form of an affidavit, and introduced accordingly.

When the opposer's case is closed, it is open to the moving party to introduce counter evidence, if he have any; and his latitude in this last respect is clearly the same as that of his adversary. If the matter in the affidavits in opposition show a state of things of which he was not previously aware, it is competent for him to ask that the motion may stand over, for some limited period, to enable him to bring evidence in reply, and likewise that he be furnished with copies of the opposing testimony; and, if the case be of sufficient importance, and the matter requiring to be rebutted is clearly new matter, the application will, in all probability, be granted, and the above condition imposed. Under a state of things calling for such an interposition on the part of the court, an adjournment on that ground would appear almost, if not entirely, a matter of right, and the legislature has made express provision for the right of a plaintiff to introduce affidavits in reply, and even for the purpose of strengthening his original case, with reference to the provisional remedies of arrest and injunction by sec. 205 and 226, as hereafter noticed, on considering those remedies. In general, however, the ori-

ginal statement and counter statement of the parties suffices for the purposes of an ordinary motion, and an adjournment for the above purpose is a matter of comparatively rare occurrence.

*Affidavit of Service.*—The moving party should of course be prepared with the usual affidavit of service of the notice or order to show cause, and the papers on which it is grounded, unless he has obtained, or can clearly rely upon an admission on the part of his adversary. If this precaution be neglected, he cannot take a default, if the opposite party fail to appear, and the proceeding may thus become nugatory.

*Default on Motion.*—Where, on the return of the notice or order, the opposite party “does not appear to oppose, the party making the motion, or obtaining the order, shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the Court shall otherwise direct.” Rule 25.

In this case, the counsel obtaining such order, must, under Rule 26, endorse his name as counsel, on the paper containing the proof of notice. If, however, the moving party fail to bring on his motion on the day specified, it seems he cannot take an order on any subsequent day. *Vernovy v. Tuuney*, 3 How. 359. If, on the contrary, the moving party fail to appear, his adversary may move, on a subsequent day, for a denial of the motion, as abandoned. The doctrine of *Vernovy v. Tuuney*, seems, however, doubtful. Where the party becomes “entitled” to take an order, under certain circumstances, it may well be argued that the mere delay to take it, can scarcely avail to deprive him of it, provided the subsequent application be made within a reasonable time and in good faith. See *Moffatt v. Ford*, 14 Barb. 577, wherein the contrary doctrine is sustained, with referncee to a cause passed at the circuit.

It is directly incumbent on the moving party to be in attendance at the time and place prescribed in the notice, and there to remain until his adversary appear, or the default is taken. This is an absolutely necessary precaution, and one which cannot safely be omitted. The usual practice of the courts is to wait for some short time, generally half an hour, before the order by default is granted, though this accommodation to the absent party is not a matter of right but of courtesy. At the expiration of the time usually allowed, the matter is then mentioned to the

judge, the form of 'calling the opposite party, (generally by the crier of the court,) is gone through, and, on his failing to appear, the order is taken as of course, unless, as provided for by Rule 25, the Court shall otherwise direct. This power the judge possesses under any circumstances, provided he consider the order applied for to be objectionable in itself, or otherwise improper to be granted, either *per se*, or without a reiterated notice to the opposite party.

In case of the failure of the counsel for the moving party to appear on the return of his motion, the opposing counsel will, after waiting the usual time, be entitled to take an order dismissing the motion, and usually with costs, the ceremony of a call and failure being gone through as above noticed. If applied for at the time, no affidavit will be necessary on which to ground this application, the fact of the counsel's attendance being patent, and within the knowledge of the judge. Should the application be delayed, and the motion to dismiss be made on any subsequent day, it should be grounded on an affidavit, proving the attendance on the one hand, and the non-appearance on the other, at the time appointed.

With a view to an application of this nature, it seems equally essential, for the opposing as well as for the moving counsel to be in attendance at the precise hour appointed. If this precaution be omitted, neither party can be assured but that his adversary may have been in attendance during the period when he himself was absent, and that an application to vacate any order he may take, may not be made and granted, on proof of that fact.

The denial of a motion by default, taken as above, is no bar to its renewal, on that default being duly excused. *Bowman v. Sheldon*, 5 Sandf. 657, 10 L. O. 338.

*Course of Hearing, where both Parties appear.*—A motion, when brought on in regular course, is heard and argued in the usual manner; the affidavits on both sides, or any other papers or documents on which the motion is grounded, are first read, after which, counsel are heard on both sides, in support, opposition, and reply, as in other cases, the right to commence and close the argument, resting, of course, with the moving party.

*Incidental Points.*—A motion must not be made premature-

ly. Thus, in divorce, a motion for alimony, *pendente lite*, noticed before service of a copy of the complaint, after demand, was adjourned, to give the defendant time to put in his answer; *Reese v. Reese*, 2 C. R. 81.

So likewise with reference to an application to appoint a committee of a lunatic, before a commission of lunacy has been issued and returned. The court possess no jurisdiction to make such an order, however pressing may be the circumstances. *In re Payn*, 8 How. 220.

Nor can a motion be made too late, under certain circumstances, as, for instance, to strike out portions of a pleading for irrelevancy. See Rule 40, of Supreme Court, and cases cited hereafter under the head of Pleading.

Objections to one pleading cannot be split up into several motions—they must all be taken at once, or a second application will be denied. *Desmond v. Woolf*, 1 C. R. 49; 6 L. O. 389.

The proper way of raising objections to the imperfect service of process, is by motion, and not by answer or demurrer. *Nones v. The Hope Mutual Life Insurance Company*, 5 How. 96, 3 C. R. 161.

Objections for irrelevancy or redundancy also, can only properly be taken by motion. *Esmond v. Van Benschoten*, 5 How. 44; *Howell v. Fraser*, 6 How. 221, 1 C. R. (N. S.) 270. See the above points more fully considered, and other cases cited hereafter, under the different heads as to pleading.

When a reference has been granted, and a report obtained under any order made on motion or petition, that report cannot be acted upon by the court, until it has been previously confirmed, by motion at Special Term, or on petition. *Gripping v. Slate*, 5 How. 205, 3 C. R. 213. The order for this purpose is, however, a matter of form, and is always entered *ex parte*, and almost as of course. See hereafter, under the head of References. See likewise *Belmont v. Smith*, 1 Duer, 675; 11 L. O. 216. The review of a report, on a collateral reference, can only be obtained on motion, and not on appeal, though the reference be to carry a judgment into effect.

The court will not interfere on motion, in a matter within the discretion of a referee, pending the reference, and before his report, even though the referee himself be desirous of obtaining the decision of the court, on a point raised in the course of the proceedings. The parties must wait for the report, and then review it in the usual mode. *Schermerhorn v. Develin*, 1 C. R. 28.

When, however, the report has been made, and appears defective, the court will then interfere on motion. *Doke v. Peek*, 1 C. R. 54; *Deming v. Post*, 1 C. R. 121. This proceeding is, however, only applicable to the curing of formal defects, and not to the review of the conclusions come to, however erroneous they may be. See hereafter, under the heads of Trial by Referees and Appeals.

A motion to set aside an appeal for irregularity, cannot be made to the tribunal appealed from; it must be to the appellate court. *Bradley v. Van Zandt*, 3 C. R. 217; *Barnum v. The Seneca County Bank*, 6 How. 82.

The powers of the court do not extend so far as to enable it to correct a final decree, regularly entered, though not enrolled, upon motion, except on consent, or as to matters quite of course. It can only be done by means of a rehearing, or, if the decree have been enrolled, by bill of review. *Picabia v. Everard*, 4 How. 113. Corrections may, however, be made as to provisions merely consequent on directions already given, such as, for instance, the correction of an insufficient notice of sale in partition. *Romaine v. McMillen*, 5 How. 318.

The decisions of Commissioners of Appraisement, under the General Railroad Act of 2d April, 1850, cannot be reviewed upon motion, but only on appeal in the manner there prescribed. *In the matter of the Albany Northern Railroad v. Cramer*, 7 How. 164. See likewise as to commissioners similarly appointed under a special charter, *Visscher v. The Hudson River Railroad Company*, 15 Barb. 37.

Nor is an application to compel the delivery of books, &c., by a public officer, under the Revised Statutes, and sec. 438 of the Code, a motion within the provisions above noticed, but a special statutory proceeding, with reference both to its incidents and the jurisdiction of the officer applied to. *Welch v. Cook*, 7 How. 282.

A doubtful question in relation to a mandamus, will not be entertained on a motion to quash it; but the mandamus will be allowed to go, that the matter may come up in due form on the return. *People v. College of Physicians*, 7 How. 290.

Although the powers of the court are theoretically unlimited, in relation to granting any relief incident to the matter in question, under the usual demand for that purpose, there are nevertheless bounds to the extent to which their exercise may be



practically relied on. See *ante*, sec. 66 of this chapter, and the cases of *Northrop v. Van Dusen*, *Mann v. Brooks*, and *Bellinger v. Martindale*, there cited.

A purely technical objection to a motion may not be allowed, if, on examining them, the papers of the objecting party are obnoxious to the same defect with which he charges those of his adversary. *Sawyer v. Schoonmaker*, 8 How. 198.

A variety of special points, applicable to different classes of motions as such, will be hereafter considered under their appropriate heads, and in connection with the proceedings to which such motions relate.

In *Burnham v. De Bevoise*, 8 How. 159, it was held that an incurable defect in a complaint is not waived by pleading, and can be taken advantage of by motion, at any time, in any stage of the action.

*Denial of Motion, Consequences of.*—An application once made and refused, or granted conditionally, cannot be subsequently made on the same state of facts to another justice.

The provisions of Rule 83 are express on this subject, as follows:

"If any application for an order be made to any justice of this court, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other justice; and if, upon such subsequent application, any order be made, it shall be revoked."

In *Bellinger v. Martindale*, 8 How. 113, it was held that, where a motion is made and denied, without any leave to renew it, it cannot be heard again, without obtaining leave from the court. Nor can such leave be granted under the general prayer for further relief in the notice. The necessary facts must be shown, and the special relief asked for.

The denial of a motion, on the default of the moving party, is, however, no bar to its renewal, if that default be sufficiently excused. *Bowman v. Sheldon*, 5 Sandf. 657; 10 L. O. 338.

The decision of a motion is never regarded in the light of "*res adjudicata*," although, as a matter of orderly practice, the court will not usually allow a motion once made and decided, to be renewed on the same facts, nor upon additional facts, without leave first obtained. *Snyder v. White*, 6 How. 321.

§ 70. *Orders. General Remarks.*

The decision of the court or judge on a motion, being pronounced, is carried into effect by means of an order.

The distinction between an order and a judgment is so broad, that, in ordinary cases, there is little risk of the one being confounded with the other. This distinction is laid down in *Bentley v. Jones*, 4 How. 335, 3 C. R. 37, in the following terms: "An order is the decision of a motion. A judgment is the decision of a trial."

In a certain class of cases, however, in relation to decisions upon demurrers, or in respect of a frivolous pleading, the limits approach more closely, and have given rise to some discussion, which will be hereafter considered under the heads of the proceedings in question. The true rule would seem to be that laid down in *Drummond v. Husson*, 8 How. 246, 1 Duer, 633, that, where the demurrer or objection goes to the whole pleading, the decision on it is a judgment: where, on the contrary, the objection is of a partial nature, so that some portion of the pleading stands unaffected by the result, it is an order. See *Reynolds v. Freeman*, 4 Sandf. 702, and other cases cited hereafter, under the heads to which those forms of proceeding are applicable.

A warrant of attachment was held to be a direction of the judge in writing, falling within the definition of an order in sec. 400, in *Conklin v. Dutcher*, 5 How. 386, 1 C. R. (N. S.) 49, and *Bank of Lansingburgh v. McKie*, 7 How. 360.

An order made by an officer having jurisdiction in the premises, however irregular it may appear to be, cannot be disregarded or treated as a nullity; the only course will be to move to vacate or set it aside. See *Blackmar v. Van Inwager*, 5 How. 367, 1 C. R. (N. S.) 80; *Hempstead v. Hempstead*, 7 How. 8; *Geller v. Hoyt*, 7 How. 265.

In a certain class of motions, such as those for a change of venue, it is usual to direct that the costs of the motion should abide the event of the action, according to the old practice in similar cases. In *Johnson v. Jillitt*, however, 8 How. 485, it was distinctly held that this cannot be done, under the Code, and that the costs of a motion cannot be taxed in, and enforced as part of a recovery on judgment, but must be given at the time, and separately enforced. This decision has not

been followed, however, but is daily disregarded in practice, and the principles laid down in it seem overstrained and unsustainable. It seems clear that the retention of the old system in this respect, is clearly within the powers of the court, as given by sec. 469, and, if admissible, that retention seems as clearly expedient in this particular instance.

*Orders, Form of.*—The form in which an order thus obtained, is to be drawn up and enforced, is next to be considered. The course to be pursued in respect of orders of course has been before pointed out. That on opposed motions, and *ex parte* proceedings of the more important nature, is drawn up in more formal terms. A skeleton form of the usual commencement of orders of these descriptions, will be found in the Appendix. The actual order itself, will, of course, depend upon the circumstances of each individual case. In all, however, it must be in strict accordance with the terms of the notice of motion, unless different directions be given by the court, in which case, those directions must be strictly followed.

An order, duly made, binds all parties to the suit who have been properly served. It is not, however, it would seem, conclusive upon a person not a party, even though he appear by counsel to oppose. See *Acker v. Ledyard*, 8 Barb. 514.

On *ex parte* applications, or, where the order applied for is of an ordinary nature, and, if granted at all, will probably be granted in the terms of the application, the usual and most convenient practice is to prepare the order beforehand. If, on the contrary, the relief granted vary from the terms of the application, the form will then have to be settled, after the decision of the judge is pronounced. Where the counsel on both sides are in court, this is usually done at once, and the terms of the order, when settled between them, are submitted to the judge forthwith, while the subject is fresh in his memory. Where, on the contrary, the decision is deferred, and subsequently delivered, in the absence of the counsel or either of them, the prevailing party then draws up the form of order, and usually, as a matter of courtesy, submits it to the opposite counsel, before applying to the judge for his signature. If any question arise on the terms of the document so drawn up, an appointment must be made for attendance before the judge who heard the application, in order that he may finally decide

as to the exact terms in which his direction is to be formally carried into effect. Occasionally, when the form of the proposed order has been handed up to the judge with the papers, or where, in his own discretion, the latter thinks fit to draw one up in his own terms, it is signed by him, without subsequent communication with the parties, or delivery of a decision in open court; in which case, the order may, of course, be entered by the prevailing party without further preliminary. Where the order is made at chambers, and as of course, the usual course is for the judge to sign his name at the foot of it. Where, however, it is made at special term, or is otherwise of such a nature as to require entry with the clerk, the practice is for him to endorse upon the document a direction for the clerk to enter it, and which constitutes the latter's authority for that purpose.

*Entry of.*]—The form of the order having been settled, and the judge's signature or endorsement obtained in all cases, the order so signed, if not one of course, as before alluded to, must be entered with the clerk of the court. The practice in this respect is distinctly laid down in *Savage v. Relyea*, 3 How. 276, 1 C. R. 42, as follows: "When a motion is made to a justice, out of term, upon notice," (and, of course, the same principles apply *à fortiori* to cases where the order is made at special term,) "as well the papers on which the motion is founded, as those used in opposition thereto, should be filed with the clerk of the county in which the venue is laid, or, in case the place of trial has been changed, in the county to which the other papers in the cause are transferred. The Code evidently contemplates that the order, or decision made by the justice, should also be entered with the clerk—all the papers and orders in a cause, should be filed and entered in the same clerk's office, and, if not so entered originally, should be transferred and filed, and the orders reentered in the office of the clerk of the county designated as the place of trial." In a subsequent part of the decision, it is laid down that the doing of this is incumbent upon the prevailing party, and that, in ordinary cases, the papers may be safely confided to him by the judge for that purpose. The principle that *ex parte* orders made at chambers, need not, in most cases, be entered with the clerk, is also distinctly enounced.

The prevailing party must accordingly see that the order is

duly entered, and the necessary papers duly filed with the clerk of the proper county, according to the principles above laid down. It is of course competent to the losing party to insist upon every paper being properly filed; and, in the event of any neglect or dereliction on the part of his adversary, he may apply to the court, either on notice, or by order to show cause. It may be very necessary to insist upon this in certain cases, where an appeal is contemplated, and in order that all the papers used on the motion in the court below, may be duly brought before the appellate tribunal.

An appeal will not lie from any order, unless first entered with the clerk as above. Provision is made in this respect by section 350, under which, for the purpose of an appeal, any party affected by an order, "may require it to be entered with the clerk, and it shall be entered accordingly." See *Savage v. Relyea*, above cited. See, also, *Nicholson v. Dunham*, 1 C. R. 119. If, on the contrary, an order be improperly entered, it may be stricken out and vacated on motion. See *Bedell v. Powell*, 3 C. R. 61.

*Ex parte* orders, where not mere matters of course, should in most cases, be entered also, and the papers on which such orders are granted should, as a general rule, be filed with them.

This is peculiarly the case with regard to those applications by which important relief is granted, under circumstances which may be contested hereafter; as, for instance, on applications for provisional remedies, or for service by publication. In *Vernam v. Holbrook*, 5 How. 3, it was, however, held that, on an application of the latter description, it is not imperatively necessary to file the affidavits; and an order of that nature was sustained, on an additional affidavit, omitted to be filed with two others which duly accompanied the order, on proof that such affidavit had been used before the judge, as well as those above referred to.

The case is, however, of an exceptional nature, and the decision evidently contemplates the filing of all the affidavits used, as the more proper course.

*Order by Consent.*—Where an order is obtained on a consent signed by the parties, it must be entered in due course, and the consent annexed to, and filed with it. In the First District, the consent and order thereupon, must be submitted to the judge and his signature obtained, before entry with the clerk. In the

second, and others, the order may be entered at once by the latter, without the judge's signature, on the consent being produced and filed.

A consent signed by the attorney or counsel in the cause requires no proof, the court taking judicial notice of their signatures. Where, however, the consent is that of the party in person, an affidavit identifying his signature to it, as such, is necessary, and should be annexed.

*Certified Copy.*—The order having been duly entered, and the papers on which it was granted duly filed, a certified copy should be obtained from the clerk of the court. His fee on such copy is the usual payment of ten cents per folio, and may be charged as a disbursement. It is an usual practice to prepare the copy and examine it with the clerk, paying him the fee. This will be found a convenient method, where despatch is an object, though, of course, it is not incumbent on the party to do so, but the clerk is, on the contrary, bound to furnish the copy on payment of his fee.

*Service of.*—The order being thus entered, and a certified copy obtained, a copy of the latter should be served on the opposite party, with a formal notice endorsed, to the effect that it is a copy of the order so made. The same is the case with reference to orders of course, not entered with the clerk, copies of which should be served in like manner, accompanied, where necessary, with the copies of the affidavits or papers on which they were granted, as before noticed. This service should, in all cases, be made at once, and should never be neglected or deferred, for the obvious reason, that the time within which an appeal may be taken by the adverse party, runs, under sec. 332, from the date of that service only, without reference to the date of making the order; and, if that precaution be neglected, the time for lodging such an appeal will therefore be indefinitely postponed.

It would seem however from the case of *Hempstead v. Hempstead*, 7 How. 8, that an omission to serve the whole of the papers necessary to be served with an order, though an irregularity, does not render the proceeding absolutely void and inoperative, until set aside on a proper application.

The certificate of a sheriff or competent officer, of the service of an order by him, would appear to be conclusive evidence of

that service, according to the principles laid down in the cases of *The Columbus Insurance Co. v. Force*, 8 How. 353; *Vankirk v. Wilds*, 11 Barb. 520; and *Sheldon v. Paine*, Court of Appeals, 30th December, 1852, heretofore cited under the head of Summons.

The peculiar statutory provisions, prescribing the papers to be served with orders granting the provisional remedies provided by the Code, and also on proceedings supplementary to judgment, will hereafter be cited in the chapters devoted to those subjects.

*Performance of Conditions.*—In cases where a motion has been granted, on payment of costs, or on the performance of any condition, or when the order requires such payment or performance, the party whose duty it is to comply therewith, is, by Rule 35 of the Supreme Court, allowed twenty days for that purpose, unless otherwise directed in the order. Where costs are to be taxed, the party is, by the same rule, allowed fifteen days for their payment, after taxation upon notice, unless otherwise ordered. The last words, giving the court a discretionary authority in relation to the payment of costs on a motion, were first inserted on the revision of the Rules in 1852, before which the period was imperative.

In *Sturtevant v. Fairman*, 4 Sandf. 674, it was held that, where an order requires a party to amend, or the like, and directs him to pay costs; the payment of those costs is not a condition precedent to the act required, unless a special provision to that effect be made or necessarily implied in the order.

Where an order opening a default imposed terms that a stipulation should be made, which, it appeared, could not be performed, it was held that the party could not appeal from the order on that ground; that his proper course would have been to give the stipulation; and that if, by reason of facts beyond his control, he could not afterwards comply with it, he should then set up such facts, in answer to the motion founded on his omission to comply. *Gale v. Vernon*, 4 Sandf. 709. The appeal in that case was accordingly dismissed, and a judgment for nonsuit, granted in consequence of the omission to stipulate under these circumstances, sustained.

*Enforcement of Orders.*—This subject, both as regards the re-

covery of costs, and also the mode of compelling the performance of an act directed to be done, by process of contempt, will be hereafter considered under the head of Execution.

*Review or Vacating of Orders.*—The questions as to the review or vacating of orders, will be likewise fully considered under the head of Appeals. *Ex parte* orders may be vacated or modified, without notice, by the judge who made them; or by the same, or any other judge, on notice, in the usual manner. (See Code, sec. 324.) Orders of any nature may be set aside for irregularity, on a regular application. An order may also be revoked, under Rule 83, if unduly obtained, by means of a second application, on the same state of facts on which a previous motion has been refused. Orders made upon notice are, in the last place, reviewable by means of an appeal, under the provisions of the Code for that purpose, as considered in a subsequent division of the work.



## BOOK V.

## OF PROVISIONAL REMEDIES.

§ 71. *General Remarks.*

SOME difficulty has been felt by the author, in assigning the most fitting place for the consideration of the remedies falling under this particular class, and to which a separate title of the Code—Title VII., Part II.—is devoted. The difficulty arises from their being extrinsic to the regular progress of the suit, and adoptable or not, at the discretion of the parties. Another is created, by the fact that the applications in question are not universally appropriate to the same, but, in some cases, to different stages of a suit when commenced. The four first heads under this title are ordinarily, though not necessarily, preliminary to, or rather, to speak more correctly, contemporaneous with the commencement; the last head is, on the contrary, more appropriate to a later period in the progress of the action. Impressed by these difficulties, the author, in his first edition, reserved the consideration of this species of relief until the concluding portion of the work, in order to preserve, as far as practicable, the unbroken continuity of the proceedings in a suit, from its first commencement by summons, to its final termination by appeal. This arrangement, whatever may be its other advantages, presents, however, the inconvenience of dissociating from their natural period of consideration, proceedings, which, under ordinary circumstances, are generally, if not universally taken, contemporaneously with the original issuing of the summons. These proceedings partake, too, in all cases of the character of interlocutory applications, and there seems, accordingly, an evident propriety in classifying them in con-

nection with that branch of jurisdiction. On these grounds, after much reflection, the author has decided on altering his original arrangement, and considering this class of remedies at the present juncture, in juxtaposition with the matters treated of in the last division; the present and the preceding book forming, as it were, a species of parenthesis, in the consideration of the progress of a suit, as such, from its original inception to its final termination. As regards the first four chapters of the book, the advantages of this arrangement are obvious; the fifth presents a little more difficulty, the appointment of a Receiver being a subject which more usually comes up for discussion, pending the preparation of the pleadings, or subsequent to the joinder of issue; and as to which it is difficult, if not impossible, to name any peculiar stage of the suit, previous to trial, to which it is more especially appropriate than to the others. In this latter view it seems, on the whole, the least inconvenient arrangement, to avoid disassociating this peculiar species of remedy from those most analogous to it; and to adopt the classification of all provisional remedies under one general head, which has already been adopted by the framers of the Code. This arrangement has accordingly been selected, and will be carried out in the five succeeding chapters, which will accordingly be devoted to the consideration of the subject, in the following order, viz.:

1. Arrest and Bail.
2. Claim and Delivery of Personal Property, or Replevin, according to the former nomenclature.
3. Injunction.
4. Attachment; and,
5. Receivership, and other minor remedies.

## CHAPTER I.

OF ARREST AND BAIL.

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§ 72. *Preliminary Remarks. Old Law, how far repealed.*

THOUGH subjected to a complete refusion, and modified in some respects by the Code, the law on this subject remains substantially the same as under the previously existing statutes. The intentions of the framers of the former measure in this respect, are expressed by themselves as follows, in page 160 of their report: "The enactments of the Code," say they, "are intended as a substitute for all the present statutes, providing for the arrest of persons upon civil process, before execution. We have," they proceed, "adhered generally to the principle of the existing laws; although, in some respects, we have restricted the right of arrest, and particularly by requiring, in all cases, an order of a judge, and, in most, an affidavit that the defendant is not a resident of the State, or is about to remove from it. We have also provided, that, before an arrest, the plaintiff must give security to pay the defendant's costs, and whatever damages he may sustain by the arrest. We have also proposed that the defendant may make a deposit of money, in all cases, instead of giving bail."

In carrying out the views thus enounced, the previous statute law upon the subject is abrogated in terms, but maintained in substance, by sec. 178, which runs as follows:

§ 178. No person shall be arrested in a civil action except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts.

Although, by the foregoing provision, the law of 26th April,

1831, is, for the most part, either repealed or substantially reënacted; still, it would seem from the case of *Gregory v. Weiner*, 1 C. R. (N. S.) 210, that, notwithstanding, a warrant may still be issued under the act of 1831, in all the cases thereby prescribed, so that a plaintiff may be considered as having the election to proceed under either measure. This conclusion is unequivocally supported by *Corwin v. Freeland*, 6 How. 241. The mode of procedure under the act of 1831 belonging exclusively to the old practice, does not enter within the scope of the present work.

The previous law as to proceedings for contempts, is modified by c. 390 of the laws of 1847, by which, imprisonment on contempt for non-payment of interlocutory costs is abolished, and the ordinary remedy of *fi. fa.* substituted for their recovery, except as respects proceedings against attorneys, counselors, or officers of the court, when ordered to pay costs for misconduct as such, and also as regards witnesses, when ordered to pay them on attachment for non-attendance. See *Buzard v. Gross*, 4 How. 23. See, also, *Vreeland v. Hughes*, 2 C. R. 42, where the court disclaimed any power to grant an attachment for costs, even though the party liable, had obtained a postponement of the trial, on the express condition of paying them.

Until very recently, the most extensive powers of provisional arrest were vested in the federal courts, in almost all cases. See *Gaines v. Travis*, 2 C. R. 102. By a recent regulation, however, the practice in those courts has been assimilated to that now under consideration.

### § 73. *Writ of Ne Exeat.*

In *Fuller v. Emeric*, 2 C. R. 58, 2 Sandf. 626, 7 L. O. 300, it was decided by the Superior Court, that the writ of "*ne exeat*" is abolished by sec. 178, according to the declared intentions of the commissioners, in page 161 of their report, and that such writ was not saved by the reservation in sec. 244 of the Code of 1849, of the other provisional remedies then existing. This view is no doubt correct, so far as the writ is looked upon, merely as the means of enforcing payment of an equitable debt; and is confirmed in *Forrest v. Forrest*, 3 C. R. 121.

In another aspect, however, the continued existence of the writ appears to be maintainable, and is maintained by the Gene-

ral Term of the First District in the same case of *Forrest v. Forrest*, 10 Barb. 46, 3 C. R. 141, 5 How. 125, 9 L. O. 89, with relation to those cases in which its office is that of a prerogative writ, and its end, to insure the performance of some act by the defendant, to compel which, the ordinary process of execution will be insufficient, if he be allowed to leave the State.

This decision was made under the Code of 1849, which contained the reservation above alluded to, but, on the amendment of 1851, that reservation was altogether stricken out, which might lead to an inference that all provisional remedies, except those specially retained by the Code, must be considered as abolished. In *Bushnell v. Bushnell*, however, 7 How. 389, (decided under the Code of 1852,) the conclusion come to in *Forrest v. Forrest* is adhered to, and the writ in question maintained to be still existent, as a provisional remedy, in the class of cases there alluded to; and this conclusion is maintained at General Term in the same case, reported 15 Barb. 399, on the broad ground that a failure of justice must otherwise ensue, no substitute being provided by the Code, to perform the office of the writ, in that aspect, and as a prerogative writ. See Code, sec. 468, by which the former practice is maintained, in cases where such a failure must otherwise ensue.

The effect of the omission to include the reservation of provisional remedies then existing, on the last revision of sec. 244, with reference to other proceedings, not included within the peculiar incidents of the writ of *Ne Exeat*, as above noticed; and, whether that alteration might not be held as abolishing all provisional remedies whatever, except those defined by the present Code; remains to be settled by judicial construction. As yet, there is no reported case bearing directly on the subject, except those above noticed.

The proceedings on this writ, in those cases in which it may still be issuable, depend, in all respects, upon the old practice, with such modifications, of course, as are essential to the new system. Thus in *Bushnell v. Bushnell*, 7 How. 389, above noticed, it was held that, before issuing this writ, it was not necessary to file the complaint, that being no longer an essential to the commencement of an action.

### § 74. *When Defendant arrestable—Statutory Provisions.*

The circumstances under which a defendant is arrestable under the Code, are thus defined by sec. 179 of that measure :

§ 179. The defendant may be arrested, as hereinafter prescribed, in the following cases :

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom ; or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud, in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested, in any action, except for a wilful injury to person, character, or property.

The provisions of this portion of the Code are, by sec. 181, made applicable to all actions commenced since 30th June, 1848, and, in which, judgment shall not have been obtained.

*Cases falling under Subdivision 1, Non-residence, &c.]—*The courts have, throughout, shown a disposition to restrict, as far as possible, the construction of the foregoing section, as regards applications on the ground of an alleged intention to remove from the State, and to require a very clear case to be made out,

before it will interfere. Thus, in *Brophey v. Rodgers*, 7 L. O. 152, an affidavit that the defendant "was about to depart for California," was held to be deficient, as not showing that such removal was made with a view of changing his residence; and a discharge of such defendant, which had been granted at special term, was accordingly maintained.

The following have been decided to come within subdivision 1, as cases of injury to the person, damages being given on a recovery as such :

An action for crim. con. *Delamater v. Russell*, 4 How. 234.

An action for seduction. *Taylor v. North*, 3 C. R. 9.

An action against a common carrier for the loss of goods intrusted to his charge, has also been held to be an injury to property, as to which, an arrest can be maintained. *Burkle v. Ells*, 4 How. 288.

With respect to the question as to when a defendant will or will not be considered as "a resident of the State," the case of *Burrows v. Miller*, 4 How. 349, subsequently cited under the head of Attachment, is important. In that case, a party, originally a resident of New York, but who had afterwards emigrated to Indiana, and, having returned from thence, was living with his father-in-law's family in New York, seeking employment there, but undetermined as to where he should settle, was held "not to be a resident of this State."

In *Haggart v. Morgan*, 4 Sandf. 198, a party who had left the State for three years, though purposing to return at some future time, when it might suit his convenience, was held to be a non-resident, and his property to be properly seized under an attachment; and this conclusion was affirmed by the Court of Appeals, in *Haggart v. Morgan*, 1 Seld. 422; where the principle is laid down, that a person may be a non-resident of the State, within the meaning of the statutes relative to non-resident debtors, while his domicile continues within the State. Actual residence, without regard to the domicile, is what is contemplated by the statute. The law as to the distinction between domicile and residence is similarly laid down in *Bartlett v. The City of New York*, 5 Sandf. 44, where a party domiciled in Westchester, but residing half the year in New York, was held to be a resident of the latter city, for the purposes of taxation. A party under these latter circumstances would seem, therefore, not to be liable to arrest under the foregoing provi-

sions. This remark must be confined, however, to an actual residence, and not to the mere keeping an office, for business purposes only.

In actions falling under this subdivision, the plaintiff, if he fails, is arrestable by the defendant in execution, and this, without special order, or reference to the fact of the defendant having, or not having been arrested, during the progress of the action. *Kloppenbergh v. Neefus*, 4 Sandf. 655.

*Cases under Subdivision 2. Agents, &c.*] — Considerable diversity of opinion existed under the Code of 1848, as to whether the expression, "fiduciary capacity," as it stood alone in that measure, embraced the case of an agent who had received and misapplied the moneys of his principal. *Dunaher v. Meyer*, 1 C. R. 87, was authority that such a case was within the meaning of the measure; *Smith v. Edmonds*, 1 C. R. 86, and *White v. McAllister*, 1 C. R. 106, that it was not. The matter is now, however, put out of doubt by the insertion in the present enactment, of the words "factor, agent, broker, or other person." In *Holbrook v. Homer*, 6 How. 86, 1 C. R. (N. S.) 406, an auctioneer, who had received goods for sale, but had failed in paying over the purchase-money to his principal, was held to be liable to arrest under this subdivision.

In *Burhans v. Cusey*, 4 Sandf. 706, a surety, intrusted with money to pay it over directly to the landlord, on account of rent due from his principal, was held arrestable under this provision. So likewise in the case of an agent, employed to collect moneys and appropriating them to his own use. *Stou v. King*, 8 How. 298; and in that of an attorney, resident in another State, and employed to collect moneys there, *Yates v. Blodgett*, 8 How. 278. A consignee, responsible for any deficiency on the sale of goods reconsigned by him to third parties, and who had received that deficiency from the original consignor, under a similar responsibility, but had neglected to perform his own agreement with his sub-consignees, was held not to stand in a fiduciary capacity, as regards the latter, and not to be arrestable in a suit commenced by them. *Angus v. Dunscomb*, 8 How. 14.

In *Pike v. Lent*, 4 Sandf. 650, where goods had been fraudulently obtained, but afterwards sold by the defendant, it was held that, though the defendant was arrestable, the security to



be put in by him, would be that required by this and the corresponding sections, and not the special undertaking required by subdivision 3. See, also, *Mulvey v. Davison*, 8 How. 111.

In *Siefke v. Tappey*, 3 C. R. 23, it was held, that the provisions of this subdivision are controlled by those of subdivision 5, and that, therefore, in an action against a female for breach of promise of marriage, an arrest cannot be made.

*Cases under Subdivision 3. Replevin, &c.*—It was held under the Code of 1849, that it was not necessary to allege or prove fraud, to justify an arrest under subdivision 3. The simple, and even *bonâ fide* removal of the goods, so that they cannot be taken by the sheriff, seems, under that measure, to have been sufficient; nor need the amount in which bail is to be given be specified; as, under sections 187 and 211, bail must be given, in double the value as fixed by the plaintiff. *Van Neste v. Conover*, 5 How. 148, 8 Barb. 509. Under the recent amendments, a fraudulent intent in the removal must now be proved, before the provisional remedy will be granted.

Where, however, the property was not in the possession or under the control of the party, and had not been so for long before the action was brought, it was held, under the former measure, that an order for arrest could not be granted. *Roberts v. Randel*, 3 Sandf. 707, 5 How. 327, 3 C. R. 190, 9 L. O. 144. In this case, it was evident, from the very nature of the circumstances, that the property taken could not be restored; and, therefore, the action was, in fact, one more in the nature of a claim for damages, than one in replevin. In *Van Neste v. Conover*, the case was different; the property there, having been recently taken away, contrary to the express terms of the sale, and being capable of redelivery in specie.

In *Merrick v. Suydam*, 1 C. R. (N. S.) 212, the same conclusion was come to, and it was held that an action cannot be had, against one who has absolutely and in good faith parted with the possession of the property, before suit brought; the exception is, when the defendant has parted with it, with the intent to deprive the plaintiff of the benefit of it, or to prevent its being retaken. In such a case only, can the defendant be held to bail. In *Remin v. Nagle*, 1 C. R. (N. S.) 219, the same conclusion is maintained, and the authority of *Roberts v. Randel*, confirmed in terms. See likewise *Brockway v. Burnap*, 12 Barb. 347; 8 How. 188.

In *Pike v. Lent*, 4 Sandf. 650, the same views are maintained, with reference to property, obtained originally by fraud, but subsequently sold out in the ordinary course of business, before action brought, and similar doctrines are laid down in *Mulvey v. Davison*, 8 How. 111.

In *Chappel v. Skinner*, 6 How. 338, it was held that a plaintiff was not at liberty to obtain possession of certain goods claimed by him, by means of the usual process of replevin; after having already arrested the defendant, under an affidavit, bringing the case within the terms of subdivision 1 of the foregoing section. He must elect between the two remedies, and cannot maintain both, simultaneously, in respect of the same transaction.

"The plaintiff's course," it was said, "was to have pursued the proceedings pointed out in chapter 2, above referred to, which do not authorize the defendant's arrest; and, if the property could not be found, and the case is within the third subdivision of sec. 179, to obtain an order, and have the defendant arrested; but, in that case, he cannot afterwards obtain the possession of the property, pending the action."

"Having, in this case, elected to have the defendant arrested and held to bail in the first instance, under one of the subdivisions of sec. 179, I think the plaintiff was bound to wait, until he was entitled, by judgment of the court, to the possession of the property, before causing it to be delivered to him. I am not able to perceive that the defendant has done any thing, by which he waived the right to have the property restored to him."

*Cases under Subdivision 4.—Fraudulently contracting Debt.*—In *Wunzer v. De Baum*, 1 C. R. (N. S.) 280, it was held that the recovery of judgment in another State, in respect of goods sold, was no bar to an action in this, grounded, in part, on the fraud by means of which such goods were originally obtained; and that, in such an action, an order for arrest may be obtained under subdivision 5 of the section now in question, in respect of such fraud. The cases of *Clark v. Rowling*, 3 Comst. 216, and *Oakley v. Aspinwall*, 4 Comst. 513, are authority in support of the right of the court, under similar circumstances, to look behind a judgment, to circumstances existent at the time the debt was originally contracted, or between that period and the recovery of the judgment.

*Cases under Subdivision 5.—Fraudulent Disposition of Property.*]

—With respect to subdivision 5, it appears to have been held that, to bring a defendant within this section, it must be shown by the affidavit that he has removed, or is about to dispose of his property, *secretly*. “The fact that he is about to depart out of the country, taking his property with him, although he owes debts to a large amount, will not subject him to the operation of this section. It is the secrecy which evinces the fraudulent intent, and not the disposal or removal of the property.” *Anon.*, 2 C. R. 51.

The questions as to a fraudulent departure or intended removal of property, will be more fully considered in a subsequent chapter, under the head of Attachment, to which, and to the cases there cited, the reader is accordingly referred. The proceedings being of an analogous nature, the authorities directly applicable to the one remedy, are collaterally so to the other, in most cases.

When a debtor has assigned all his property for the benefit of preferred creditors, without any provision relative to a possible surplus; the mere omission is not such evidence of an intent to defraud as will be deemed sufficient to warrant his arrest. *Spies v. Joel*, 1 Duer, 669.

A partner cannot arrest a partner, on an allegation of this description. He has no remedy under these circumstances but in a suit for an injunction and receiver. *Cary v. Williams*, 1 Duer, 667.

*Same Subdivision.—Arrest of Female.*—The views of the Court of Common Pleas, and of the Superior Court, are at direct variance, on the subject of the illegal detention or concealment of property by a female. It was held by the former tribunal, in *Starr v. Kent*, 2 C. R. 30, that a female may be arrested, in an action to recover the possession of personal property, if that property be concealed, removed, or disposed of, so that it cannot be found by the sheriff: the court considering that such concealment or removal was a wilful injury to property, coming within the terms of subdivision 5. In *Tracy v. Leland*, 3 C. R. 47, 2 Sandf. 729, 8 L. O. 234, it was held, on the contrary, by the latter, that a concealment of property by a female, under precisely similar circumstances, was not a case of wilful injury to property, within that subdivision, and the case of *Starr v. Kent* was distinctly and in terms overruled.

A female is not arrestable in action for breach of promise of marriage, under the authority of *Siefke v. Tappey*, 3 C. R. 23, before cited.

In *Anon.*, 1 Duer, 613, 8 How. 134, it was held by *Campbell, J.*, in the Superior Court, that, notwithstanding the provision above cited, rendering a female arrestable for her wilful torts, the rule of common law is not altered, which exempts a married woman from arrest in all cases whatever; and likewise that the Code does not authorize the arrest of the husband, in any action founded solely either upon the contract or tort of the wife, in which he is not a participant.

*Personal Privilege from Arrest.*—With reference to arrests under the foregoing section, the fact that persons standing in various peculiar positions, such as members of the Legislature, Ambassadors, Consuls, &c., possess a personal privilege from arrest of any description whatsoever, must not be overlooked. See this subject heretofore considered and cases cited, under the head of Parties. See also as to the privileges of witnesses, *Stewart v. Howard*, 15 Barb. 26. The personal privilege of infants, in particular, should be carefully borne in mind. See *Brown v. McCune*, 5 Sandf. 224.

*Arrest for Usurpation of Office.*—The provisions of sec. 435, under which, in actions by the Attorney-General in respect of usurpation of office, the defendant is arrestable, must not be overlooked, though, necessarily, the proceeding is one of comparatively infrequent occurrence.

*General Remarks.*—A long and doubtful discussion has taken place as to whether, when an arrest is sought under circumstances of fraud, it is or is not necessary that such fraud should be averred on the complaint. The cases on the subject are numerous, and directly contradictory to each other. The point more immediately at issue is, however, as to an arrest on execution after judgment; and, therefore, though pertinent, they are not directly applicable to that immediately under consideration. They will be found collected and fully commented upon, under the heads of Pleading and Execution, and may be referred to accordingly.

*Wilson v. Robinson*, 6 How. 110, has reference to a criminal arrest, and is therefore not within the scope of this work.

### § 75. *Application for Arrest, when and how made.*

*Time of Application.*—Under the measure of 1848, an arrest might be applied for “at the time of commencing the action,” and doubts arose as to the construction of this clause; *Dunaher v. Meyer* being authority that the order might be made before service of summons; see, also, *Gregory v. Weiner*, 1 C. R. (N.S.) 210; and *Lee v. Averill*, 2 Sandf. 621, 1 C. R. 73, to the contrary effect. The point is, however, now set at rest by the present amendment in sec. 183, which provides that “the order may be made to accompany the summons,” which involves, of necessity, its being obtained before the actual service of the latter.

*Mode of Application.*—The application for an arrest must, under sec. 180, be made to a judge of the court in which the action is brought, or a county judge. The motion is of course *ex parte*, and without notice.

It must be grounded on affidavit, the requisites of which are thus prescribed by sec. 181:

§ 181. The order may be made, where it shall appear to the judge by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

*Form of Affidavit.*—Great care must be bestowed upon the preparation of the affidavit in question, as, the remedy being one involving the liberty of the citizen, the court will, in all cases, require a strict compliance with the letter of the statute; and that a clear case warranting their interference should be distinctly shown. The following decisions will throw considerable light upon the subject:

In *Adams v. Mills*, 3 How. 219, (an application under subdivision 1,) the learned judge expressed himself thus: “To authorize an order to hold to bail, the affidavits must show a good cause of action, and that the defendant is a transient person, or is about to depart beyond the jurisdiction of the court; and this must rest, not merely upon information and belief, but facts and circumstances must be set forth, from which such an inference may properly be drawn. The declarations of the defendant as to his intentions, are, of course, amongst the most

satisfactory kinds of evidence, to show that he is about to go beyond the jurisdiction of the court." The same case is also authority, that such affidavits were not open to objection, on the ground of their being sworn before the plaintiff's attorney, as justice of the peace, because, when they were sworn to, no suit had been commenced. It would be safer and better, however, to have such affidavit sworn before an indifferent party, in all cases where possible. The action in that case was in slander, and the affidavit omitted to aver that the words spoken were false. The order was accordingly vacated, on the ground that no cause of action had been shown.

In *Martin v. Vanderlip*, 3 How. 265, 1 C. R. 41, it was held to be "well settled, both in England and in this State, that the affidavit to hold to bail must be positive, and not argumentative," and must make out a *prima facie* case against the defendant; and also, that "the former practice," in similar cases, "remained in force, except so far as it is modified by the Code in matters of form."

In *Pindar v. Black*, 4 How. 95, it was decided that, in an affidavit of this nature, two things must be made to appear; 1, that a sufficient cause of action exists, and 2, that such cause of action is among those specified in sec. 179. It is not sufficient for the party merely to state that his case is one of those mentioned in that section; the facts must be stated to show that it is so. See *Frost v. Willard*, 9 Barb. 440, after cited under the head of Attachment. It is not necessary, it would seem, for the party to state, in terms, that "an action has been or is about to be commenced," though perhaps it would be better to do so. The same case is also authority as to the power of the court to grant a warrant to arrest an unknown defendant, which was there called in question.

The affidavit must be positive, and must show facts and circumstances, to evince the fraudulent intent alleged. Where, therefore, the affidavit on which an attachment was grounded, merely stated on the "information and belief" of the plaintiff, that "the defendant was a fraudulent and absconding debtor," and that his property "was being conveyed away with intent to defraud his creditors," without offering any evidence, (even on information,) of any act of the defendant showing such fraudulent intent, a judgment obtained upon that attachment was reversed, with costs. *Camp v. Tibbetts*, 3 C. R. 45. See, also,

as to the sufficiency of such an affidavit, the case of *Brophy v. Rogers*, 7 L. O. 152, before cited in this chapter, and, likewise, *Frost v. Willard*, 9 Barb. 440, above referred to. In *Whitlock v. Roth*, however, 10 Barb. 78; 5 How. 143, 9 L. O. 95, 3 C. R. 142, it was held, that "an order for arrest may be obtained on an affidavit stating information and belief; but the nature, quality, and sources of the information must be disclosed, so that the judge's mind may have something to work upon, and he may be able to determine whether the belief is well founded or not." Good reasons, too, must be given why a positive statement cannot be procured. See, also, *Pomroy v. Hindmarsh*, 5 How. 437; and *Camman v. Tompkins*, and *Gilbert v. Tompkins*, 1 C. R. (N. S.) pp. 12 and 16, subsequently cited on the analogous questions of injunction and attachment. See likewise as to averments on belief unsupported by facts, *Fleury v. Roget*, 5 Sandf. 646. So also in *Vanderpool v. Kissam*, 4 Sandf. 715, an affidavit in a case of malicious prosecution, merely stating in general terms the existence of malice and the want of probable cause, was held insufficient, as not stating the facts relied on as *prima facie* evidence to sustain the averment so made.

Where a sufficient cause of action has been set forth, special cause for requiring bail need not be proved, as under the former practice. *Baker v. Swackhamer*, 5 How. 251; 3 C. R. 248.

In reference to allegations as to the fraudulent disposition of his property by a defendant, and the necessity of averring that such disposition has been made "secretly," see *Anon.*, 2 C. R. 51, before cited.

To give any precise form for an affidavit of this nature would be impossible, inasmuch as such affidavit must, of necessity, vary according to the circumstances of each particular application. One only caution appears necessary with reference to this, as to other similar cases; and this is, that, on all occasions, the gravamen of the charge against the defendant should be summed up in the exact words of the statute itself, and should be stated throughout, in accordance with that wording, so as to bring the case, in precise and definite terms, within one or more of the subdivisions of sec. 179. It is impossible to insist too strongly upon the expediency of strict attention being paid to this rule, in all questions, of whatever nature; and, likewise, on the principles laid down in the foregoing decisions, particularly with reference to the clear and correct

statement of the cause of action, being kept in mind on all occasions.

*Security.*]—On applying for the order, the plaintiff must also be prepared with security, in compliance with the provisions of sec. 182 in that respect, which run as follows:

§ 182. Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities.

This undertaking must, under sec. 423, be filed with the clerk of the court, and must be duly proved and acknowledged, in compliance with Rule 72 of the Supreme Court. The form will be found in the Appendix.

In *Richardson v. Craig*, 1 Duer, 666, it is held that the undertaking in question must, in all cases, be executed by the plaintiff in person; though possibly in the case of an infant or *feme covert*, the next friend or guardian might be reasonably considered a plaintiff, and his undertaking sufficient. The order in that case was refused, because the undertaking was not executed by the plaintiff, although the latter was non-resident, it being held that the terms of the Code admitted of no other interpretation. Whether this view is maintainable in all its strictness, and whether, in this construction, the words *on the part of the plaintiff* have received their full latitude, seems doubtful; there can be no doubt, however, that the plaintiff's signature had better be obtained in all cases, where possible at the time.

In *Leopold v. Poppenheimer*, 1 C. R. 39, it was held, that no copy of this undertaking need be served on the defendant at the time of the arrest. "When the officer issues an order of arrest, he, in effect, decides on the sufficiency of the undertaking, and such decision is '*res adjudicata*.' The Code deprives the defendant of any benefit of exception to the sureties *in per-*



*sonam*; the delivery, therefore, to him of a copy of the undertaking would be useless."

It seems, too, by the case of *Manley v. Patterson*, 3 C. R. 89, that the defendant is entirely without remedy, if the plaintiff's sureties omit to justify, or even on showing them to be insufficient or insolvent. The Court even doubted whether "the judge had any right to refuse an order for arrest," where the sheriff had returned that the property was eloigned, "even if he was fully aware that the plaintiff had put in sham security." The arrest in that case was, however, vacated on another ground, hereafter noticed.

It would appear, however, by analogy with the principles laid down in *Davis v. Marshall*, 14 Barb. 96, with reference to the issuing of an attachment by a justice, that the giving the undertaking by the defendant in the form above mentioned, is a condition precedent to the making the order, and that, if omitted, the proceeding will be voidable, if not void. See *Bennett v. Brown*, 4 Comst. 254, there cited.

*Order of Arrest.*—The form of order to be applied for, and the necessary subscription or endorsement, is thus provided for, in sec. 183:

§ 183. The order may be made to accompany the summons, or at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney, by whom it shall be subscribed or endorsed.

See Appendix.

The time of the return of this order not being fixed by special provision, should be inserted at some reasonable date. The first day of the succeeding term may, in the majority of instances, be a proper period to insert, but each case will be governed by its peculiar circumstances. The amount of bail required, must also be fixed. In ordinary cases, the proper sum will be double the amount of the claim. The matter rests, however, in the discretion of the judge, and may be modified by him accordingly. See *Baker v. Swackhamer*, 5 How. 251, 3 C. R. 248, hereafter cited.

It has been held that an arrest cannot be made on execution, unless an order has been obtained under this section. *Squire*

v. *Flynn*, 8 Barb. 169; 2 C. R. 117. See, however, this point fully considered under the head of Execution.

The affidavit, undertaking, and order, having been thus prepared, and submitted to the judge to whom application is made, his signature must be obtained to the latter, if his decision be to grant it. The undertaking having been filed as above directed, the affidavit and order of arrest must thereupon be delivered to the sheriff, as provided by sec. 184, with all necessary instructions, to enable him to discover and arrest the defendant. The judge should also endorse his approval on the undertaking before it is filed.

### § 76. *Mode and Incidents of Arrest.*

With this delivery, the duty of the plaintiff's attorney is completed, and that of the sheriff commences. In cases where immediate despatch is necessary, it may be convenient to prepare and hand to the sheriff, with the originals, copies of the affidavit and order, which, under the same section, it is his duty to deliver to the defendant at the time of the arrest. In strictness, it is the sheriff's duty to make them, but the necessary delay for that purpose, however short, might possibly, in some cases, involve inconvenience.

In *Keeler v. Belts*, 3 C. R. 183, it was held, that an omission on the part of the sheriff, to serve a copy of the order of arrest as thus directed, is a defect which may be cured by amendment. It is, however, clearly an irregularity, and, in that case, costs were imposed as a condition of such amendment.

Where, however, the sheriff has made a return, by which it appears that all necessary proceedings were taken, that return is conclusive, and cannot be impeached. *The Columbus Insurance Company v. Force*, 8 How. 353. See *ante*, under the heads of Sheriff and Service.

The arrest itself is to be made in the usual manner, as prescribed by sec. 185. The liability of the sheriff, in respect of an escape or otherwise, is expressly provided for by sections 201 and 202. If a deposit be made, or bail be given, and justified as hereafter noticed, the sheriff's liability is at an end; but, if not, he is, himself, liable as bail. He may, however, discharge himself from that liability, by the giving and justification of bail, in the same manner as provided with respect to the defend-

ant himself, at any time before the latter is charged in execution; but, after he has been so charged, his powers in that respect are gone, and his liability is the same as that of other bail. *Beekman v. Carnley*, 9 How. 180; *Surtos v. Merceques*, 9 How. 188. His liability, as above, may be enforced, by proceeding against him or his sureties, in the usual manner. If, on the other hand, bail be put in on the part of the defendant, and such bail, or others, fail to justify, they will, under sec. 203, be liable to the sheriff, by action, for any damages which he may sustain by that omission.

The statutory provisions, as to the granting of the liberties of the jail to prisoners, and also in relation to escapes, will be found in articles 3 and 4 of title VI., chap. II., part III. of the Revised Statutes, 2 R. S. 432 to 439. *Tunner v. Hallenbeck*, 4 How. 297, is authority that the subsequent death of an escaped prisoner, even before the commencement of the action, does not operate as a discharge of the sheriff; but that, on the contrary, such cause of action is complete when the escape takes place, liable, however, to be defeated by the voluntary return or recapture of the debtor, before suit brought. The sheriff takes the risk of the party's death, as it had there happened.

See also *Hutchinson v. Brand*, 6 How. 73, affirmed by Court of Appeals, 31st December, 1853, a case of escape upon execution, which holds that no defect or irregularity in the process under which a prisoner is arrested, can be alleged by the sheriff, as an excuse for an escape. Unless the process be actually void, and not merely voidable on application of the parties, he remains answerable. In the same case, it is laid down that, in an action for escape, the sheriff is liable for the whole judgment and costs, but not for interest on the former.

*Course, if Arrest not made within Time limited.*—If the sheriff fail to arrest the defendant within the time prescribed by the order, an amendment should be applied for on the same papers, under the powers conferred by sec. 174.

### § 77. *Course of Defendant, when arrested.*

*Motion to Vacate.*—On the arrest taking place, the first point to be looked into by the defendant is, in relation to the validity of the order of arrest, and also as to the amount of the bail

thereby required to be given; as, if the order be informal, or if the bail demanded be excessive, relief may be obtained by him, by means of a special application to the court. His powers in this respect are conferred by sec. 204, in the following terms:

§ 204. A defendant arrested may, at any time before the justification of bail, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

The motion for this purpose must be made upon notice in the usual manner, or upon an order to show cause. If grounded on a positive defect on the papers on which the arrest was granted, no affidavits will of course be necessary. If, on the other hand, the application be grounded on facts extrinsic to the case as made by the plaintiff, the facts so adduced must, of course, be proved on affidavit in the usual manner, and copies of such affidavits must be served with the notice or order to show cause, in due course.

*Affidavits on Motion.*—In *Martin v. Vanderlip*, 3 How. 265, 1 C. R. 41, it is held that, except in matters of form, the old practice still remains in force. When indebtedness is sworn to positively by the plaintiff, the counter affidavit of the defendant, denying it, will not be received, for that would lead to trial upon affidavits, of every cause in which the defendant is arrested. See also *Adams v. Mills*, 3 How. 219. This last doctrine is, however, somewhat qualified by that laid down in *Barber v. Hubbard*, 3 C. R. 169, before cited.

According to the doctrine as laid down in *Martin v. Vanderlip*, and *Adams v. Mills*, above cited, it seems that, if the defendant move for his discharge, on the ground of any defect in the original affidavit, the plaintiff cannot supply that defect by a supplementary one. Section 205, it is there held, only applies to cases where the motion for discharge is founded on proofs adduced by the defendant, and not when it is based upon a defect *ab initio*. The defendant may show any matter in avoidance, as an insolvent's discharge, that he was privileged from arrest, or the like.

There seems, however, reason to doubt whether the plaintiff might not, on application, be let in to amend his affidavits. See *Spalding v. Spalding*, 3 How. 297, 1 C. R. 64, and the authorities there cited, on the analogous question of replevin.

In *Camp v. Tibbetts*, 3 C. R. 45, also before cited, the defendant

was let in to prove, on affidavit, that the sheriff had made an incorrect return, in stating that the property there in question had been concealed by him; and, having established that he had not made an improper disposition of it, the order for his arrest was vacated. This case must be distinguished from those before cited, as to the conclusiveness of a sheriff's return, in respect of matters falling directly within the scope of his official duties. The line of distinction would seem to be between the official acts of the sheriff, as such, and collateral facts connected therewith. The service of process is clearly referable to the former class; the circumstances under which the sheriff has been unable to seize property affected by a writ in his hands, belong as clearly to the latter.

In *Manley v. Patterson*, 3 C. R. 89, a similar conclusion was come to, and, it being established that the defendant had not removed or concealed the property there in question, so as to warrant his arrest, the order for that purpose was vacated.

In *Barber v. Hubbard*, 3 C. R. 126, it is stated to have been held that, on a motion to discharge an order of arrest, it is competent "to read affidavits, denying the allegations in the affidavits on which the order was granted, and, such denial being implicitly made, as to matters material to the arrest, the order will be vacated." No facts are given in the report.

The case is subsequently fully reported, 3 C. R. 169, on appeal from the above decision at special term, on which the order was affirmed, on the point above referred to. The views taken in *Martin v. Vanderlip*, as to the nature of the affidavits which may be adduced, are, at first sight, overruled by this decision. The defendant, it was there held, is not arrested on an affidavit of mere indebtedness, but on the ground of something in the nature of fraud, and it is competent for him to state any circumstances, tending to disprove or explain away the fraud so alleged. "The Code sets no limit to the matters to be contained in the affidavits, on either side," and none, it was there held, will be imposed. The case of *Morgan v. Avery*, subsequently cited under the head of Attachment, is referred to in the course of the decision. The doctrines as laid down in these decisions, may, however, be reconciled to this extent, viz: that in an action on contract, the mere fact of indebtedness, as constituting the ground of the action itself, cannot be contested on affidavits, though collateral circumstances, tending to show fraud, and thus

bearing not on the ultimate recovery, but on the immediate and extrinsic remedy, are contestable in that manner. By the drawing of this distinction, the fundamental doctrine of these decisions is brought into perfect harmony, and this appears to be the correct view. See the principles laid down, and the distinctions drawn, as to facts intrinsic or extrinsic to the record, in *Wilmerding v. Moon*, 8 How. 213.

"If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may," under sec. 205, "oppose the same by affidavits or other proofs, in addition to those upon which the order for arrest was made. See *Martin v. Vanderlip*, 3 How. 265, 1 C. R. 41, above cited. The questions as to the admissibility of counter affidavits in general, and as to whether a verified pleading is or is not admissible in that light, will be found fully treated under the subsequent heads of Injunction and Attachment, to which the decisions in relation to that point are primarily applicable.

*General Incidents of Motion.*—It appears from the case of *Dunaher v. Meyer*, 1 C. R. 87, that such motion need not necessarily be made before the judge who granted the order to arrest.

The defendant cannot move to vacate, on the ground that special cause for requiring bail has not been shown, as under the former practice. The setting forth a sufficient cause of action is now enough. *Baker v. Swackhamer*, 5 How. 251; 3 C. R. 248.

It was also held in the same case, that the defendant might move to reduce the amount of bail, on the plaintiff's own showing. The amount was there reduced accordingly to \$500, the case being one of libel, not of an aggravated character, and the defendants, permanent residents, and not transient persons.

Several of the cases before cited are authorities as to the circumstances under which, if shown, an order of arrest will be vacated. See, in particular, *Brophy v. Rogers*, and *Adams v. Mills*, as above referred to.

In *Martin v. Vanderlip*, 3 How. 265, 1 C. R. 41, the question as to the facts, which may, or may not be stated, with a view to entitle the defendant to a discharge of such an order, is fully entered into.

That decision, as before noticed, lays down the principle that, except in matters of form, the old practice still remains in force.

A motion of this nature must be made, before the defendant has taken any step in the matter, which amounts to an admission of the legality of his arrest. The test of his privilege in this respect, is afforded by sec. 204, above cited, where this liberty is reserved to him at any time before the justification of bail. See *Barber v. Hubbard*, 3 C. R. 169, above cited. See also similar principles, with reference to a defendant being concluded from contesting the facts on which an attachment was originally issued, by giving security under it, as laid down in *Haggart v. Morgan*, 1 Seld. 422. The mere putting in of bail waives all objections to the form of the plaintiff's affidavit, or on the ground of privilege from arrest. *Stewart v. Howard*, 15 Barb. 26. See similar principles with regard to the estoppel of the bail themselves, as laid down in *Gregory v. Levy*, 12 Barb. 610; 7 How. 37. See, also, generally, as to the waiver of formal objections by an unconditional appearance, *Webb v. Mott*, 6 How. 439, and cases there cited.

In *Barber v. Hubbard*, above cited, it was further held that the privilege of the defendant, as above, could not be considered as waived by any mere inactivity on his part, or by a very long acquiescence. A more restricted view is, however, taken in *Lewis v. Truesdell*, 3 Sandf. 706, where it was held that if, before moving to vacate the order, the defendant allow the time within which the plaintiff may except to the bail given by him to elapse, and the bail to become perfect, it will be no longer competent for him to do so." "The defendant, by submitting to put in and perfect bail, accedes to the regularity of his arrest, and the sufficiency of the grounds for it."

In *Barker v. Dillon*, 1 C. R. (N. S.) 206, 9 L. O. 310, the same conclusion is come to, and the same proposition enounced. In that case, however, the defendant had acquiesced for eighteen months, and allowed his bail to be sued, and then surrendered himself in discharge of their liability, before making the application; under which circumstances, his acquiescence in the proceeding was abundantly clear.

The test as established by sec. 204, is fully maintained in *Wilmerding v. Moon*, 8 How. 213, where it was held that a mere delay of the application to vacate, was no bar to the motion; and that an order of arrest, founded on extrinsic facts, might, where bail had not been given, be vacated upon a proper application, at any time before the defendant had been charged

in execution, even though judgment had been entered, as was there the case. The question, as to whether the application could or could not be entertained, after the defendant had been so charged, was declined by the court.

In *The Columbus Insurance Company v. Force*, 8 How. 353, the court doubted whether the obtaining further time to answer, or even an actual answer, unless there had been unreasonable delay, would be a waiver of the irregularity of an arrest in the same suit.

On a motion to vacate an order of arrest, founded on affidavits denying the plaintiff's allegations, the court will weigh the evidence on both sides, to determine whether the order shall or shall not stand, and decide accordingly. *Falconer v. Elias*, 3 Sandf. 731; 1 C. R. (N. S.) 155.

In *Lithaner v. Turner*, 1 C. R. (N. S.) 210, a motion to vacate an order of arrest was denied, though it was admitted, that an attachment in respect of the same cause of action was pending in another State. See also *Fowler v. Brook*, there referred to.

A motion of this nature is the only proper remedy, where the action is one in which the defendant cannot be arrested. *Holbrook v. Homer*, 1 C. R. (N. S.) 406; 6 How. 86.

### § 78. *Bail by Defendant.*

Assuming that the defendant is satisfied that no grounds exist, by means of which the order of arrest can be vacated, or the amount of bail reduced, by means of a special application as above; or if his application for that purpose have failed, two modes are open to him, by which he may obtain his immediate release. 1st. By giving bail; or, 2d. By depositing the amount claimed. These proceedings may be taken by him, under sec. 186, "at any time before execution." After judgment, the plaintiff's remedy ceases of course to be provisional, and becomes absolute, under the execution, if duly issued. See subsequent chapter on that subject.

The mode in which bail is to be given is thus prescribed by sec. 187:

§ 187. The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall at



all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or, if he be arrested for the cause mentioned in the third subdivision of section 179, an undertaking to the same effect as that provided by section 211.

In cases of ordinary arrest, the bail will be discharged, on surrender of the defendant in due time. When, however, the arrest is in respect of fraudulent concealment of property, the sureties will not merely be responsible for the safe custody of the defendant, but also for the value of the property claimed, under the provisions of sec. 211, as above referred to. See this subject considered in the succeeding chapter. This distinction is an important one, and must not be lost sight of, with reference to the liability of the sureties themselves. The disqualifications under which various parties labor in respect of becoming bail, are in no manner affected by the Code, and remain exactly as under the former practice, the works on which subject may accordingly be referred to when necessary. It would seem from *Baker v. Swackhamer*, 5 How. 251, 3 C. R. 248, that, when the defendant is a permanent resident, a less amount of bail will be required for his appearance, than when he is a transient person.

The qualifications of bail under the Code are thus prescribed by sec. 194:

§ 194. The qualifications of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder, within the State.
2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Where the proceedings are taken in a court of limited jurisdiction, it would seem that the sureties ought to be resident within the district embraced by its powers. See *Herrick v. Taylor*, 1 C. R. (N. S.) 382. (Note.)

The form of the undertaking to be signed by the bail will be found in the Appendix. Their affidavits must be subjoined, to the effect there given, and strictly following the words of the

section. The forms ordinarily sold are deficient in one respect, as not specially excluding property exempt from execution, and are therefore unsafe, unless previously altered in this respect. The document must also, under Rule 72 of the Supreme Court, be acknowledged as a deed of real estate, before it can be received or filed. The above requisites must be strictly complied with, or the proceeding will be of no effect. It will be better, also, that the residences of the sureties should be stated on the undertaking. See, as to appeals, *Blood v. Wilder*, 6 How. 446.

The undertaking, when perfected, must be delivered to the sheriff, who is bound to receive the bail, if sufficient, and to release the defendant thereupon; though of course it is competent for him to refuse an undertaking deficient in any respect, either as regards the sureties, or the form of the document itself. The sheriff must then, "within the time limited by the order, deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail." See sec. 192. The original remains with him, until a failure to comply has taken place, and the subsequent directions of the court be given, as hereafter specified.

It has been a practice with the sheriff to dispense with this acknowledgment, and also with the affidavit of justification, unless the bail be excepted to, and to accept, in the first instance, a simple undertaking, to the effect prescribed. Whether he had really power to do so seemed doubtful, even under Rule 76, now 72, as it originally stood. It seems still more so, under the recent amendment of that rule, on which the words, "This rule shall not apply to cases when the duty of the officer in taking security is prescribed by the Code of Procedure," have been stricken out; and the rule is made generally applicable, in all instances, "whenever a justice or other officer approves of the security to be given in any case," without any distinction or exception whatsoever.

Under Rule 89, inserted on the last revision, the original affidavits must now be filed by the sheriff with the clerk, within ten days after the arrest.

### § 79. *Exception and Justification.*

*Exception by Plaintiff.*—If the plaintiff omit to except to the bail within the ten days allowed for that purpose, he is bound by the proceeding, and the sheriff will be exonerated from liability. If, on the contrary, he deem it insufficient, he may, by sec. 192, “within ten days thereafter,” *i. e.*, after the delivery of the order of arrest, with the sheriff’s return as above, “serve upon the sheriff a notice that he does not accept the bail; or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.” The notice may be simply in the words of this section, being of course properly entitled, addressed, and served.

*Notice of Justification.*—The course of proceeding to be adopted by the sheriff, on the receipt of such notice, is thus prescribed by sec. 193:

§ 193. On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same, or other bail, (specifying the places of residence and occupation of the latter,) before a judge of the court, or county judge, at a specified time and place, the time to be not less than five, nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section one hundred and eighty-seven.

*Justification.*—The mode of justification is then pointed out by sec. 195:

§ 195. For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

N. B. It is evident that the words “justice of the peace,” in this section, and also in sec. 194, must be read “county judge;” the correction in this respect, in analogy with the amendment in sec. 193, having escaped the attention of the Legislature.

The period for justification by the sureties, may be extended beyond the limit prescribed in the notice, on good cause shown; an order must, however, be duly obtained, and a fresh notice given. *Burns v. Robbins*, 1 C. R. 62.

A re-justification was allowed in *Hees v. Snell*, 8 How. 185, on a technical failure by the sureties to attend at the precise hour appointed.

The justification must, under Rule 84 of the Supreme Court, take place "within the county where the defendant shall have been arrested, or where the bail reside." The plaintiff or his agent is, therefore, bound to attend, wherever notice may be given in due accordance with this provision. If, on the contrary, the notice be given for the wrong county, it will be a nullity, and the sheriff will not be discharged, unless the plaintiff waive the objection, by appearing on the examination, or otherwise by direct acquiescence in the proceeding.

If, on the justification, more than two bail be brought forward, they may, under sec. 194, be allowed by the judge "to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail," *i. e.*, equivalent to at least double the amount specified in the order.

If the bail fail to justify, the plaintiff should obtain from the judge a certificate to that effect, as evidence of the fact, and in order to the establishment of the sheriff's liability, if necessary. In this case, it would seem that the sureties themselves are discharged from all responsibility. See *Ward v. Syme*, 4 Comst. 161; 1 C. R. (N. S.) 266. Where the contrary is the case, the course to be adopted on behalf of the sheriff or defendant, is thus prescribed by sec. 196:

§ 196. If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

*Disposal of Undertaking.*—It will be observed that, under these circumstances, the undertaking passes from the custody of the sheriff into that of the clerk, in whose hands it remains, subject to the further disposition of the court. There is no reported decision on the subject; but it would probably be held, that the proper clerk to be intrusted with the custody of

the instrument in question, will be the clerk of the court or county in which the action is brought; or of that in which the venue is laid, if in the Supreme Court.

The same is doubtless the case in relation to the original affidavits, which must now be filed within ten days after the arrest, under Rule 89.

### § 80. *Surrender by Bail.*

The mode in which it is competent for the bail to discharge themselves from their liability, by a surrender of the defendant, is thus prescribed by sections 188 and 189:

§ 188. At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court, or county judge, may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated; and, on filing the order and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for the cause mentioned in subdivision 3 of section 179, so as to discharge the bail from an undertaking, given to the effect provided by section 211.

§ 189. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him; or, by a written authority, endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

*In Re Taylor*, 7 How. 212, it was considered by *Humphrey*, county judge, that it was competent for any one or more of several bail, to give the authority above provided for, without the concurrence of all concerned; and also, that though they had failed to justify, the bail in that case were competent to surrender their principal, and authorized to take all necessary steps for that purpose.

It will be seen that, in cases falling under subdivision 3 of sec. 179, the mere surrender of the defendant does not discharge the bail from further pecuniary liability, as before noticed.

The sheriff, when liable as bail, in consequence of the failure of the defendant's sureties to justify, is entitled to the same privileges as bail in other cases. At any time before the defendant is actually charged in execution, he may discharge himself by giving substituted bail; but, afterwards, his privilege in this respect is gone. It is still competent for him, however, to claim the same right to relief as bail in other cases, (see sec. 191,) if, within the twenty days allowed by that section after action brought, he obtain, by any means, the lawful custody of the defendant, so that he can be retained on the execution. *Buckman v. Carnley*, 9 How. 180; *Sartos v. Merceques*, 9 How. 188.

### § 81. Remedies against Bail.

The plaintiff's remedy against the bail, if they fail to surrender the defendant, is thus provided for by section 190:

§ 190. In case of failure to comply with the undertaking, the bail may be proceeded against, by action only.

For this purpose, an application should be previously made to the court, for an order that the undertaking may be delivered out to the plaintiff, by the sheriff or clerk, as the case may be. The order may be obtained *ex parte*, and need not be served on the opposite party. The facts establishing the failure should, however, be shown by a short affidavit to that effect.

In an action against sureties, under a bond given on the arrest of a defendant, the fact that the party bringing the action is the aggrieved party, must be averred on the complaint. If not, the action cannot be sustained. *Raynor v. Clark*, 7 Barb. 581; 3 C. R. 230.

In an action against bail, they cannot impeach the legality of the original arrest; the undertaking imports their liability, and they are estopped from controverting it. Their only remedy is to surrender their principal. *Gregory v. Levy*, 12 Barb. 612; 7 How. 37.

## § 82. *Exoneration of Bail.*

The following provisions are made by sec. 191, in relation to the circumstances under which the bail may be exonerated, after action so brought against them:

§ 191. The bail may be exonerated, either by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof; within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

In *Barker v. Russell*, 1 C. R. (N. S.) 5, the bail were discharged, on the ground, there taken, that the defendant was not liable to arrest at all, on account of an omission to aver fraud on the pleadings. This decision was, however, reversed by the General Term, *Barker v. Russell*, 11 Barb. 303, 1 C. R. (N. S.) 57, though a temporary stay of proceedings was granted, to enable them to surrender their principal.

In *Gregory v. Levy*, 12 Barb. 610; 7 How. 37, it was held that a surrender and exoneration was the only remedy open to bail, who strove to controvert the legality of the original order of arrest, from doing which they were estopped by their undertaking.

In *Holbrook v. Homer*, 6 How. 86, 1 C. R. (N. S.) 406, it was also held, that an exoneration could not be applied for, on the ground that the defendant was not liable to be arrested. The only remedy, under such circumstances, was a motion by the defendant, under sec. 204. The case did not fall within the provisions of sec. 191. The question as to the effect of a surrender does not appear to have come up for consideration.

A sheriff, who has become liable, as bail, by the omission of the defendant's sureties to justify, is entitled to the full benefit of this section, and to the same remedies as bail in other cases. No process is necessary to enable him to arrest the defendant; and if, during the twenty days allowed, he can by any lawful means obtain the custody of the person of the latter, so that he can be held on execution, his liability will be discharged. *Buckman v. Carnley*, 9 How. 180; *Sartos v. Merceques*, 9 How. 188.

### § 83. *Deposit in lieu of Bail.*

*Mode of making.*—Where, however, the defendant is either unable or unwilling to procure bail, it lies in his power to obtain his discharge, at the time of his arrest, by means of a deposit in the hands of the sheriff. The following are the provisions on this subject, as contained in sections 197 and 198:

§ 197. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 198. The sheriff shall, within four days after the deposit, pay the same into court; and shall take from the officer receiving the same, two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

*Withdrawal of, on giving Bail.*—In this event, it is competent for the defendant afterwards to withdraw the amount so deposited, on giving bail in lieu thereof. This provision is made by section 199:

§ 199. If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in sec. 193, any time before judgment; and, thereupon, the judge before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

*Application of, when not withdrawn.*—The application of the amount deposited as above, where bail is not subsequently given, is thus prescribed by sec. 200:

§ 200. Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and, after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.



## § 84. *Concluding Remarks.*

*Execution against Person, Effect of.*—If, on judgment being recovered, and execution issued against the person, the defendant be still in custody, the provisional arrest, will, of course be merged in that under the subsequent process. If, on the contrary, the defendant be out on bail, his arrest on the execution may take place, and, if made, will exonerate the sureties.

*Discharge by Operation of Law, or otherwise.*—It remains to consider the cases in which a defendant may be discharged from arrest, under special circumstances, or by operation of law.

Insanity, either at or subsequent to the arrest, forms no ground for an unconditional discharge. The only manner in which a defendant can be removed from the legal custody, is under the act in relation to lunatic asylums, passed 7th April, 1842, and that, during his insanity only. *Bush v. Pettibone*, 4 Comst. 300; 1 C. R. (N. S.) 264.

A defendant will be released from imprisonment by operation of law, on his discharge as an insolvent, under the provisions of title I., chap. V., part II. of the Revised Statutes, particularly of articles 3, 4, 5, 6 and 7 of that title. See 2 R. S. pp. 1 to 52. The proceedings in relation to a discharge of this nature are in nowise affected by the Code, and belong entirely to the old practice.

## CHAPTER II.

### OF CLAIM AND DELIVERY OF PERSONAL PROPERTY.

## § 85. *General Characteristics of Replevin under Code.*

THE provisions of the Code, in this respect, are clearly intended as a substitute for the provisional relief heretofore obtained in the action of replevin, under the old practice. *Roberts v. Randel*, 3 Sandf. 707; 5 How. 327; 3 C. R. 190; 9 L. O. 144; *McCurdy v. Brown*, 1 Duer, 101; *Wilson v. Wheeler*, 6 How. 49; 1 C. R. (N. S.) 402. In the latter case, it was con-

sidered that the former practice on replevin was still in force, in many respects in an action of this nature, which seems clearly to be the case, inasmuch as the provisions made by the chapter of the Code now under immediate consideration, are only partial in their operation, and relate to the provisional remedy alone, without in any manner affecting the subsequent proceedings, for the decision of the controversy, as to whether the plaintiff is or is not entitled to the property itself, in respect of which the provisional remedy is sought in the first instance.

The different points in relation to the action of replevin, considered as an action, and apart from the provisional remedy obtainable at the outset, will be hereafter considered under their proper heads. A specific equitable lien cannot be enforced in an action for replevin; *Otis v. Sill*, 8 Barb. 102; that remedy is only applicable to cases where the possession of the property itself is sought, not where a charge is merely claimed upon it. In this form of action, the possession of the property may be sought, with or without damages for the withholding, (sec. 167, subdivision 6;) and, under sec. 277, judgment may be taken, either for the possession of the property, or for its value, in case a delivery cannot be had, with damages for its detention. It would seem from the case of *Suydam v. Jenkins*, 3 Sandf. 614, that it is competent for the plaintiff to elect to take judgment for the value of the goods claimed, instead of their return, and that he can equally recover damages; that, in such case, the assessable value of the goods will be that at the time of the replevin, and not at that of such election; and that, if such value be an insufficient redress for the injury, the deficiency may be made good in the estimate of damages; and the law as to the measure of the latter is fully laid down.

Although the claim for the recovery of the property, or judgment for its value, is maintainable in the action of replevin, the provisional remedies now under consideration cannot be obtained in a proceeding in the nature of an action of trespass "*de bonis asportatis*" under the old practice, and in which damages only, and not the return of the property itself, are sought by the complaint. An action of that nature falls under subdivision 2 of section 167, and is incompatible with replevin, which falls, on the contrary, within subdivision 6; *Spalding v. Spalding*, 3 How. 297; 1 C. R. 61; and it was there held that the proceedings could not be amended, under the provisions in

relation to amendments, as they stood in the Code of 1848. This latter conclusion was dissented from in *Dows v. Green*, 3 How. 377, and an amendment was there allowed under similar circumstances; the decision otherwise confirming the authority of *Spalding v. Spalding*, as to the incompatibility of obtaining the provisional remedies applicable to the action of replevin, in one in which relief for the trespass only is sought, and not the recovery of the property itself. In *Maxwell v. Farnam*, 7 How. 236, it was similarly held that the redelivery of property, and the payment of damages for its conversion, are claims incompatible in their nature, and incapable of joinder in the same action.

In *Chappel v. Skinner*, 6 How. 338, it was, in like manner, decided that the remedy of obtaining possession of the goods, by means of replevin, was incompatible with a previous arrest under section 179. See citation of the case in the preceding chapter. The plaintiff cannot have both remedies simultaneously, and must make his election between them. The conclusion come to by the court is thus expressed:

"The plaintiff's course was to have pursued the proceedings pointed out in chapter II. above referred to," *i. e.*, that now under consideration, "which do not authorize the defendant's arrest; and, if the property could not be found, and the case is within the 3d subdivision of section 179, to obtain an order, and have the defendant arrested; but, in that case, he cannot afterwards obtain the possession of the property pending the action.

"Having in this case elected to have the defendant arrested and held to bail in the first instance, under one of the subdivisions of sec. 179, I think the plaintiff was bound to wait, until he was entitled by the judgment of the court to the possession of the property, before causing it to be delivered to him. I am not able to perceive that the defendant has done any thing by which he waived the right to have the property restored to him."

In reference to the circumstances under which an action of this description can or cannot be maintained, when the defendant has parted with the possession of the property, see the last chapter, and the cases of *Roberts v. Randel*, *Van Neste v. Conover*, *Merrick v. Suydam*, *Remin v. Nagle*, *Brockway v. Burnap*, *Pike v. Lent*, and *Mulvey v. Davison*, there cited.

It appears from these cases that replevin is not maintainable

against a person who has, *bonâ fide*, parted with the possession of the property claimed, before the suit for its recovery has been commenced; but otherwise, in cases where such property has been removed, in expectation of a proceeding for its recovery, and in fraud of that proceeding.

The plaintiff in replevin can only recover upon a legal title; he must show, as heretofore, an absolute or special property, giving him an immediate right to the possession of the goods claimed. Where a lien is relied on, actual possession of the property is indispensable, and a mere equitable lien cannot be so enforced, but must be asserted in a specific suit for that purpose. If the title set up in the complaint be denied by the answer, the defendant is not bound to prove his right to the goods in question, till that of the plaintiff has been, *primâ facie*, established; and, if the latter fail to prove his title, the former is entitled to a judgment for the value of the goods, if taken. *McCurdy v. Brown*, 1 Duer, 101. See, also, *Roberts v. Randel*, above cited.

To maintain an action of replevin, a previous demand of the property is not necessary, unless where the defendant is an innocent bailee or holder. *Pringle v. Phillips*, 5 Sandf. 157.

The possession of a document of no value on its face, may be recovered in this form of action, and evidence to prove its actual value may be given. So held with reference to a warehouse entry, in *Knehue v. Williams*, 1 Duer, 597; 11 L. O. 187.

The recovery and collection of a judgment for value, in this form of action, transfers the title to the property itself, and will act as an estoppel on a subsequent claim of title. *Russell v. Gray*, 11 Barb. 541. See, also, *Austin v. Chapman*, 11 L. O. 103.

An action of this nature will not lie, as between the owner of goods and a constable, for property in the latter's hands, by virtue of an attachment, unless such property be such as is exempted from attachment. "Replevin will not lie for property in the custody of the law." *Keyser v. Waterbury*, 3 C. R. 233.

The above doctrine must, however, be received with some qualification, as, for instance, the case of a disputed execution, or an illegal, though actual levy; in which cases, and many similar ones that might be adduced, where the legality of the actual custody is disputed, replevin would clearly be not only an admissible, but the proper remedy.

The questions in relation to the action of replevin, generally

considered, having thus been adverted to, we now approach the subject of the provisional remedy immediately under consideration.

### § 86. *Provisional Remedy—how obtained.*

This remedy may, under sec. 206, be obtained in an action of this nature, "at the time of issuing the summons, or at any time before answer." It is, therefore, only applicable to the outset of the action, and, if delayed until after the service of the complaint, may be frustrated, by an answer being put in by the defendant.

It is obvious, that the proper course will be to draw the summons, and the necessary papers for the application for the provisional remedy, at the same time; to apply to the court thereupon; and then to serve the summons, and lodge the affidavit with the sheriff concurrently.

*Affidavit, Form of.*]—In order to the obtaining of the provisional remedy, an affidavit must be prepared as follows, in the manner prescribed by sec. 207:

§ 207. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth.
2. That the property is wrongfully detained by the defendant.
3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.
4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,
5. The actual value of the property.

A form of this affidavit is given in the Appendix. The property must, of course, be correctly and fully described.

An allegation by the plaintiff, that he is "owner" of the property, is sufficient, under subdivision 1. The facts as to his

right need only be set forth, when he claims, in the words of the section, "a special property therein." *Burns v. Robbins*, 1 C. R. 62. The same doctrine is maintained in *Vanderburgh v. Van Valkenburgh*, 8 Barb. 217, (reported on another point, 1 C. R. (N.S.) 169,) below cited under the head of Pleading.

Where, however, a special property is claimed, the facts as to that special property must be clearly set out, as concisely as practicable, but, at the same time, with sufficient fulness. To give a general precedent would of course be impracticable, as the statement will necessarily be one of fact, applicable to the particular case only. The same remark may be made as to that of the alleged cause of detention by the defendant.

The questions as to the extent to which property is exempt from seizure, will be hereafter considered under the head of Execution.

That as to the form of affidavit "showing" such exemption, has given rise to two decisions directly contradictory to each other. In *Spalding v. Spalding*, 3 How. 297, 1 C. R. 64, the court held, that, to conform to the requirements of this section, the affidavit must *show* that the property claimed to be exempt from seizure, is so exempt, by a detailed statement of the facts. By *Roberts v. Willard*, 1 C. R. 100, the above decision was overruled in terms, the learned judge saying he doubted not that the fact of exemption might be shown, by a statement of that fact upon the advice of counsel, after a full statement of all the facts of the case to such counsel, before such advice was given; and, perhaps, by a naked allegation of the party in his affidavit that the property was so exempt, provided that allegation be made positively. A statement upon mere belief will be insufficient under any circumstances, (same case,) and a short allegation of the facts will evidently be the more expedient course in all instances. See in relation to the subject of exemption in general, *Cole v. Stevens*, 9 Barb. 676.

It is, of course, essential to the validity of the affidavit under the above provisions, that some value should be stated on its face, to comply with subdivision 5. That value may, however, be arbitrary, and have reference to extrinsic circumstances. Thus, replevin was held to be maintainable for a warehouse entry, though bearing no actual value on its face. *Kinch v. Williams*, 1 Duer, 597; 11 L. O. 187.

The affidavit in these cases will be irregular, if sworn before the plaintiff's attorney. *Anon.*, 4 How. 290. Any irregularity in that part of the proceedings will, however, be waived by the subsequent unconditional appearance of the defendant. *Roberts v. Willard*, 1 C. R. 100, above cited.

In *Spalding v. Spalding*, above cited, it was held that the original affidavits, if defective, may be amended by subsequent ones, on a motion to set aside the proceedings.

*Requisition to Sheriff.*]—The affidavit being prepared, an endorsement must be made upon it by or on behalf of the plaintiff, as directed by sec. 208, in the following terms:

§ 208. The plaintiff may, thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

The signature of the plaintiff's attorney to this requisition, though not expressly prescribed, will doubtless be held sufficient.

*Undertaking, Form of; Delivery to Sheriff—Sheriff's Duty thereon.*]—The affidavit, and notice endorsed, must then be delivered to the sheriff, accompanied by an undertaking, as thus prescribed by sec. 209:

§ 209. Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound, in double the value of the property as stated in the affidavit, for the prosecution of the action; for the return of the property to the defendant, if return thereof be adjudged; and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff; the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

The form of this undertaking will be found in the Appendix. It is subject to the same general conditions as those treated of in the last chapter; the sureties must subjoin the usual affidavit,

and it must be duly proved and acknowledged under Rule 72. See, also, *Anon.*, 4 How. 290.

The sheriff must endorse his approval in writing, on the undertaking. *Burns v. Robbins*, 1 C. R. 62. By the same case the following points are also decided: 1. That a party to a suit cannot be properly taken by the sheriff as a surety; 2. That, if the name of a party has been inserted jointly with that of another, the sheriff may erase the former, provided he approves of the undertaking with one surety only; 3. That if he originally intended to require two, then he may require another name to be inserted in the place of that of the party, before he approve; but, 4. That no change can be so made in the undertaking, unless the original surety assents to it.

An undertaking duly given stands in the place of, and effects a change in the title to the property. *Austin v. Chapman*, 11 L. O. 103. See likewise *Russell v. Gray*, 11 Barb. 541, before cited as to the similar effect of an actual recovery.

*Sheriff's Course of Proceeding.*—On lodgment with the sheriff of the affidavit, notice, and undertaking, as above, and, on approval by him of the latter, the proceeding is complete, no application to the court being necessary. The sheriff then seizes the property, giving notice to the defendant as above prescribed. If he seize the goods of a wrong party, he will be liable under his official bond, and is answerable for the acts of his deputies. See *The People v. Schuyler*, 4 Comst. 173. Nor will the fact that he was directed to take the specific goods in question, be any protection to him under these circumstances. *Stimpson v. Reynolds*, 14 Barb. 506.

The powers of the sheriff, in relation to seizure of the property, are thus prescribed by sec. 214:

§ 214. If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

### § 87. *Defendant's Course of Action, and ulterior Proceedings.*

On seizure of the property, three courses are open to the defendant:



1. He may move to set aside the plaintiff's proceedings, on the ground of irregularity.
2. He may require the plaintiff's sureties to justify ; or,
3. He may give counter security, for the purpose of retaining the property.

*Motion to set aside.*—If he move to set aside, the motion must be noticed at once, and before excepting to the sureties, or taking any other proceeding, and an interim stay of proceedings, and extension of the time to except, or give counter security, must be at once applied for. By requiring the sureties to justify, his right to make a motion on the ground of irregularity will be gone. See cases cited in last chapter on the analogous question of arrest. Three days only are allowed him for the former purpose.

By requiring the sureties to justify, the defendant will likewise lose his rights to give counter security. See sec. 210. These points should, of course, be weighed well, and at once, before deciding on the precise course to be adopted.

*Justification by Plaintiff's Sureties.*—The proceedings, where justification is demanded, are thus prescribed by sec. 210 :

§ 210. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify, on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

The proceedings, it will be seen, are substantially the same as those treated of in the last chapter. If the plaintiff's sureties omit to justify, it seems the defendant will be without remedy, except as against the sheriff. See *Manley v. Patterson*, 3 C. R. 89, there cited.

The case of *Burns v. Robbins*, 1 C. R. 62, above referred to, is authority, as to the power of the court to allow further time for sureties to justify, upon good cause shown ; but, it seems,

a new notice must be given by them, under these circumstances.

*Counter Security by Defendant.*—If, on the contrary, the defendant is desirous of retaining the property on counter security, it is competent for him to do so under sec. 211, which runs as follows :

§ 211. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged ; and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.

It will be seen that, if these proceedings are not taken within the three days allowed as above, the property is to be delivered by the sheriff to the plaintiff, except in the event of a claim by a third party, as hereafter noticed.

*Justification by Defendant's Sureties.*—In all cases, the defendant's sureties must justify, as follows, under sec. 212 :

§ 212. The defendant's sureties, upon a notice to the plaintiff of not less than two, nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest ; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived ; and may retain the property until that time ; but, if they, or others in their place, fail to justify, at the time and place appointed, he shall deliver the property to the plaintiff.

*General Qualifications of Sureties.*—The qualifications of the sureties in general, and their justification, are the same as those on arrest, as treated of in the preceding chapter. See Code, sec. 213.

*Disposal of Property ; Sheriff's Fees and Acts.*—If the defendant's sureties justify in due course, the property, as above pre-

scribed, must be delivered to the defendant; if they fail to do so, then to the plaintiff. In the meantime it is to remain in the custody of the sheriff, who is entitled to be paid his fees and necessary expenses, by the party to whom it is eventually delivered. Sec. 215. For the fees in question, see 2 R. S. 644 to 647. The expenses must of course be reasonable, and, if any question arise, a taxation of his account may be applied for, in the usual manner. The doctrine that the return of the sheriff is, as a general rule, conclusive as to his official acts, holds good as to proceedings in replevin, as under the other circumstances previously noticed. See *Russell v. Gray*, before cited.

*Claim by Third Person.*—The contingency of a claim to the property by a third party, and the indemnity that may be required by the sheriff thereon, are thus provided for by sec. 216:

§ 216. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff; the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and, notwithstanding such claim, when so made, he may retain the property a reasonable time, to demand such indemnity.

*Ultimate Disposal of Undertakings.*—By section 423, the disposal of the different undertakings referred to in this chapter is made the subject of a special and exceptional provision, and it is directed that, after the justification of the sureties, they shall be delivered by the sheriff, to the parties respectively for whose benefit they were taken. This seems to abrogate the former doctrine, that the indemnities to be given under the old practice, were for the benefit of the sheriff, and not of the party. See *Russell v. Gray*, 11 Barb. 541.

*Ultimate Disposal of Papers.*—The ultimate disposal of the papers is prescribed by sec. 217, as follows:

§ 217. The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

*Ultimate Disposal of Property.*]—The property, when disposed of in any of the above methods, remains subject to the disposition of the court on the hearing of the cause; and a delivery may be demanded, or the liability of the sureties enforced accordingly, in the usual manner, on an order or decree being duly made.

*On Discontinuance, Property to be restored.*]—The plaintiff cannot discontinue his action, without providing for the return of the property to the defendant, as well as for the payment of costs. If the defendant be in a situation to ask for a dismissal of the complaint, he should set the cause down, and take judgment by default, in the ordinary course. He cannot obtain a judgment for a return, on the usual motion for dismissal. *Wilson v. Wheeler*, 6 How. 49; 1 C. R. (N. S.) 402.

## CHAPTER III.

### INJUNCTION.

#### § 88. *Preliminary Remarks: By whom granted.*

THE remedy of injunction, though in some respects altered in form, remains, in all its substantial parts, the same as under the former practice.

The definition of that remedy, as now existent, and of the officers by application to whom it is obtainable, is thus contained in sec. 218:

§ 218. The writ of injunction as a provisional remedy is abolished; and an injunction, by order, is substituted therefor. The order may be made by the court in which the action is brought, or by a judge

thereof, or by a county judge, in the cases provided in the next section ; and, when made by a judge, may be enforced as the order of the court.

In *Livingston v. Hudson River Railroad Company*, 3 C. R. 143, the following is stated to have been decided, though no facts are given—*i. e.* : “It is improper to grant an injunction, where the question involved has been already decided at a special term, a distinct suit being an irregular mode of obtaining a review of that decision.”

Such motions, in practice, are always made to the single judge. The power of the General Term to entertain them, if thought expedient, is, however, asserted in *Drake v. The Hudson River Railroad Company*, 2 C. R. 67.

The powers of the county judge in this respect, and the limits within which those powers are exercisable, have been before considered, in the chapter as to the general machinery of a suit, under the head of Motions. See, in particular, *Eddy v. Howlet*, and *Peebles v. Rogers*, there cited. The substitution of an order for the former writ of injunction is merely formal, and calculated to simplify, instead of complicating the practice.

### § 89. *When obtainable—General Classification.*

The circumstances under which an injunction is obtainable, are thus laid down in sec. 219 :

§ 219. Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded ; and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff ; or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual ; a temporary injunction may be granted, to restrain such act. And where, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

The injunctions obtainable under this section, may be classed under the two main divisions of preliminary or subsidiary ; the

former arising upon the case as stated upon the complaint, and forming part of the relief originally demanded; the latter obtainable in respect of subsequent acts of the defendant. A third description, which may be denominated as extraneous, arises under the last section, in respect of circumstances unconnected with the immediate controversy between the parties, but tending incidentally to defeat the plaintiff's rights. This branch of the subject is closely connected with that of proceedings supplementary to execution, as hereafter to be considered: and the powers here conferred, when exercised, give to those provisions a species of retrospective effect, by restraining, *pendente lite*, any disposition of the defendant's property, which might tend to defeat the remedy sought for by the suit, when ultimately obtained.

### § 90. *Preliminary Injunctions.*

*When granted.*.]—Proceeding with the consideration of these remedies, in the order above prescribed, the first which presents itself is the preliminary injunction, applied for at the outset of the suit, and forming part of the relief originally demanded. It will be seen, that one main condition precedent to an application of this nature is, that the plaintiff's title to relief, and, in particular, to the injunction applied for, should appear by the complaint; unless this be the case, it cannot be granted.

Thus, it has been held that an injunction is only obtainable by a plaintiff. A defendant, as defendant, is not competent to move for one, except in the very improbable case of his title to do so appearing by the complaint. His only method of proceeding is to serve a summons and complaint in the nature of a cross-suit, and then proceed therein as plaintiff. *Thursby v. Mills*, 1 C. R. 83.

In *Cure v. Crawford*, 5 How. 293, 1 C. R. (N. S.) 18, the powers of the court under the code, in relation to the granting of injunctions, are asserted in the strongest and widest terms. They now extend, it was held, to the restraining any act which may produce injury to the plaintiff. The provisions of the Revised Statutes, particularly those in Vol. 2, 516, sec. 47, in conflict with these powers, are repealed by sec. 463. "The inquiry, and the only one, it appears to me," says the learned Judge, (Edmonds,) "which, under the Code, can be made, is whether the

act which is sought to be restrained is lawful or not." The question on that particular case, was, as to the provisions of the Revised Statutes above referred to, which enact that proceedings to remove a tenant, shall not be stayed or suspended, by any writ or order of any court or officer. The conclusion, so come to, was contrary to the expressed opinion of the learned judge himself, in *Smith v. Moffat*, 1 Barb. 65; his confidence in which, he said, remained unshaken, though he held that the law, as there laid down, was repealed by the Code.

In *Wordsworth v. Lyon*, however, 5 How. 463, 1 C. R. (N.S.) 163, the decision in *Cure v. Crawford* was disapproved, and it was held that an injunction cannot be granted under such circumstances. The act of 3d April, 1849, gives an appeal, and provides for a stay of proceedings thereon, on cases of this nature, and the remedy of the plaintiff lies under that act, and not by injunction. The doctrines as to repeal of the provisions of the Revised Statutes, as laid down in the same case, were also controverted, and *Smith v. Moffat* maintained to be still good law, as well under the Code as under the former practice. These views are also enounced by *Roosevelt, J.*, in *Hyatt v. Burr*, 8 How. 168.

In *Capet v. Parker*, 3 Sandf. 662, 1 C. R. (N.S.) 90, the doctrine in *Cure v. Crawford* is supported, though in modified terms. It was held that, where the objection lies to the jurisdiction of the justice to proceed in the matter, or where fraud is shown, (see *Jones v. Stuyvesant*, note, 3 Sandf. 665,) an injunction may be granted; the same view being held as in *Cure v. Crawford*, as to the virtual repeal of the section immediately in question.

In *Forrester v. Wilson*, 1 Duer, 624, 11 L. O. 124, it was also held, that the court possessed the power of relieving a tenant, on equitable terms, where the warrant had been obtained by surprise. The payment of the rent due was there made a condition precedent, and the general ground taken was, that, as the magistrate, by the issuing of the warrant, was *functus officio*, the plaintiff, unless by the interposition of a Court of Equity, would be remediless.

The two last decisions rest upon very strong grounds, and, if a proper distinction be drawn, they seem reconcilable with those previously cited. The general ground taken in *Cure v. Crawford* appears too broad. That the higher courts are still prohibited from interfering in this class of cases, under ordinary circumstances, and within the limits of the ordinary jurisdiction of

the justice, seems to be the preferable view, so long as that jurisdiction is duly exercised. But, where the jurisdiction itself is questioned, or where fraud or surprise is shown, the general language of the Code, embracing all acts, without distinction, the commission of which would produce injury, may be fairly held to repeal *pro tanto* the positive prohibition before noticed.

In *Corning v. The Troy Iron and Nail Factory*, 6 How. 89, 1 C. R. (N. S.) 405, the unlimited doctrine in relation to the powers of the court, as laid down in *Cure v. Crawford*, is disapproved, and it was held that the law in relation to injunction is not materially changed. It is not enough for a plaintiff, on a motion for a temporary injunction, to show that the continuance of the acts complained of, will do him an injury; he must also show, that he will be entitled to final relief by injunction. The question there arose as to the obstruction of a watercourse, which was held to be a case to which the remedy of injunction was applicable, and it was accordingly granted, on modified terms. Similar relief was granted in respect of such an obstruction in *Clark v. Mayor of Syracuse*, 13 Barb. 32. See as to the right to maintain obstructions in a private watercourse, as protected in *Curtis v. Keeler*, 14 Barb. 511.

An injunction will not be granted, unless it be shown that the plaintiff has some interest in the premises; and that the defendant is wrongfully in possession, and is committing actual injury. *Smith v. Reno*, 6 How. 124; 1 C. R. (N. S.) 405.

So, where the party has a sufficient remedy in an action for trespass, and it does not appear that the injury is irreparable, an injunction ought not to be granted. *Livingston v. The Hudson River Railroad Company*, 3 C. R. 143.

It will not be granted to restrain acts, in respect of which no final judgment is prayed. A temporary injunction, to restrain a defendant from committing trespasses in premises adjoining those which were the actual subject of the suit, was accordingly refused, on these grounds, in *Hulce v. Thompson*, 8 How. 475. See the same principle, as laid down in *Corning v. The Troy Iron and Nail Factory*, above cited. That doctrine, *i. e.*, that a temporary injunction cannot be maintained, unless the plaintiff makes out a case, showing that he is entitled to final relief by injunction, is further maintained in *Ward v. Dewey*, 7 How. 17. See also *Wordsworth v. Lyon*, 5 How. 463.

Where the plaintiff's title to relief cannot be maintained, as in



the case of an action, brought by a creditor at large, to set aside a general assignment, an injunction cannot be retained. The powers of the courts to grant injunctions are enlarged by the Code, but that enlargement does not enlarge the rights of a plaintiff to bring his action. *Neustadt v. Joel*, 12 L. O. 148.

In respect to the granting of a perpetual injunction, see *Auburn and Cato Plank-road Co. v. Douglass*, 12 Barb. 553, affirmed by the Court of Appeals, 12th April, 1854. See likewise *The Attorney-General v. The Mayor of New York*, 12 L. O. 17; *Milhau v. Sharp*, 15 Barb. 193; same case, 9 How. 102; *Stuyvesant v. Pearsall*, 15 Barb. 244; *Ingalls v. Morgan*, Court of Appeals, 12th April, 1854, affirming *Ingalls v. Morgan*, 12 Barbour, 578.

So it has been also held that an injunction cannot be granted under the first branch of sec. 219, as above cited, unless the complaint contain a demand for such injunction, as part of the relief sought; nor, it would seem, does the second branch of it aid the plaintiff in case of such an omission, inasmuch as that provision applies only to the case of a necessity arising during litigation, and not existing before it. *Hovey v. McCrea*, 4 How. 31.

Nor can an injunction be granted, inconsistent with the relief prayed for in the complaint. Thus, where a complaint was founded on a trespass in cutting wood, and damages were claimed, an injunction to restrain the defendant from continuing the acts complained of, was dissolved on that ground; and, also, because the continuance of the trespass could not tend to render the judgment ineffectual, as proportionate damages would be recovered. *Townshend v. Tanner*, 3 How. 384; 2 C. R. 6; see likewise *Austin v. Chapman*, below cited. The doctrine of waste of this description, is fully examined into in *Kidd v. Dennison*, 6 Barb. 9; *Van Wyck v. Alliger*, 6 Barb. 507; *Johnson v. White*, 11 Barb. 194, and *Rodgers v. Rodgers*, 11 Barb. 595.

It will not be granted, where the plaintiff's title to relief is disputed, and does not clearly appear, or where actual injury or damage is not clearly shown. *Goulding v. Bain*, 4 Sandf. 716. See *Austin v. Chapman*, 11 L. O. 103; *Bennett v. American Art Union*, 5 Sandf. 614, 10 L. O. 132. See likewise *Harrison v. Newton*, 9 L. O. 311, 1 C. R. (N. S.) 207; same case, 9 L. O. 347.

Where, however, an injunction forms part of the relief asked for, it will be granted to stay waste or trespass, if attended with irreparable mischief, or if the defendant be irresponsible; even where the plaintiff's right is in dispute, and his title doubtful; *Spear v. Cutter*, 4 How. 175; 5 Barb. 486: the defendant in that case being even in actual possession of the property, under a decision by a County Judge, which decision had been carried to the Supreme Court for reversal, and was still undetermined.

An injunction, *pendente lite*, was also granted to restrain the sale of goods, charged to have been obtained by fraud, and the title to which was disputed, in *Malcolm v. Miller*, 6 How. 456.

In *Olmstead v. Loomis*, 6 Barb. 152, it was held that, to authorize an injunction, there must not only be a clear violation of the plaintiff's rights, but the rights themselves should be certain, and capable of being clearly ascertained. See, also, *Harrison v. Newton*, 9 L. O. 347, below cited.

Nor will an injunction be granted to restrain the prosecution of works by a railroad company, in a mode by which injury is anticipated as possible, but not shown to be certain to accrue. *Commissioners of Highways v. Albany Northern Railroad Company*, 8 How. 70. See likewise *Harrison v. Newton*, 9 L. O. 311, 1 C. R. (N. S.) 207; and *Tillotson v. The Hudson River Railroad Company*, Court of Appeals, 18th April, 1854, affirming same case, 15 Barb. 406.

In cases of this nature, however, the Court will interfere and restrain the progress of the works, where the injury sought to be restrained is definite, and incurred at once and before their completion. *Wheeler v. Rochester and Syracuse Railroad Company*, 12 Barb. 227.

In *Linden v. Hepburn*, 3 Sandf. 668, 3 C. R. 165; 5 How. 188; 9 L. O. 80, it was decided that, under a complaint which prayed for judgment of forfeiture of a term, and also for an injunction, to restrain the defendants from making alterations in the meantime; both forms of relief could not be granted in the same proceeding. An injunction which had there been granted, was accordingly ordered to be reversed, unless the plaintiff's stipulated not to take judgment for a forfeiture, amending their complaint so as to ask for damages; in that case, it was to stand, as the case made by the complaint would have entitled them to an injunction, had they asked alone for that remedy.

An injunction cannot now be obtained in one suit, to stay the prosecution of another in the same court. The proper course is to make an application to stay proceedings, in the suit which is sought to be stopped, upon the usual notice to the plaintiff in that suit. *Dederick v. Hoysradt*, 4 How. 350; *Hunt v. Farmers' Loan and Trust Company*, 8 How. 416. The application to stay cannot be made in the first of such suits; it can only be entertained in the second, on motion made in the proper district. *Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1.

Nor can an injunction be granted by one court, to stay proceedings in a suit pending in another court of the State, having equal power to grant the relief sought by the complaint. *Grant v. Quick*, 5 Sandf. 612.

In *Burkhardt v. Sanford*, however, 7 How. 329, an injunction, obtained by a purchaser of the estate of a non-resident debtor, claiming to redeem under a sale on execution, in an action commenced by attachment after the date of his purchase, and seeking to restrain payment by the sheriff to the execution creditor, was held to be maintainable in principle; though vacated on another ground, it not being shown that the safety of the fund would be endangered by the payment in question.

An injunction will not be granted on a complaint, the allegations in which are all verified on information and belief. If nothing is sworn to, of the party's own knowledge, that would entitle him to an injunction, the application will be denied. *Jones v. Atterbury*, 1 C. R. (N. S.) 87. See, also, *Pomroy v. Hindmarsh*, below cited. See likewise *Burkhardt v. Sanford*, *supra*; *Roome v. Webb*, 3 How. 327, 1 C. R. 114, and various cases to the same effect, under the heads of Arrest and Attachment.

The following cases have reference to the subject of injunctions in general, without regard to the peculiar form of application:

In *Dillon v. Horn*, 5 How. 35, an injunction and receiver were granted, at the suit of a general creditor of insolvent general partners, the debt not being denied.

In *Hascall v. The Madison University*, 8 Barb. 174, 1 C. R. (N. S.) 170, it was held that the founders of an institution, on condition of its being located in a specified place, might obtain an injunction against its unauthorized removal to another.

In *Howard v. Henriques*, 3 Sandf. 725, an injunction was

granted to restrain the defendants from making use of the name of the plaintiff's hotel. See, also, *Stone v. Carlan*, 3 C. R. 67.

In *Gillott v. Kettle*, 12 L. O. 120, the infringement of the plaintiff's trade-mark was restrained.

In *McCrackan v. Ware*, 3 Sandf. 688, 1 C. R. (N. S.) 215, where cross suits had been instituted, respecting partnership property, to which both parties claimed an equal right, and an injunction and receiver had been granted in one suit, it was held to be as of course to grant the same remedy in the other, without special cause being shown.

An injunction will not, however, be granted to restrain the due use of partnership property, where security has been given, and no abuse of such property is to be apprehended. *Dunham v. Jarvis*, 8 Barb. 88. See, as to the latter point, *Austin v. Chapman*, 11 L. O. 103. Where the partnership articles do not provide for that contingency, a solvent partner is not entitled, as of right, to the sole administration of the funds of a firm, dissolved by the separate insolvency of others of its members, and he may be restrained by injunction, under these circumstances, though a preference will be given to him on appointing a receiver of those funds. *Hubbard v. Guild*, 1 Duer, 662. Where, however, on the dissolution of a partnership, there has been a special agreement that one partner shall assume the winding up of the concern, his management will not be interfered with, in the absence of fraud. *Weber v. Defor*, 8 How. 502. Nor will an injunction be granted to restrain the proceedings of a receiver, appointed under supplementary proceedings, to enforce payment of a judgment against copartnership property. The proper course is to apply in the suit in which he has been appointed, and not to institute fresh proceedings. *Van-Rensselaer v. Emery*, 9 How. 135.

Where a partnership had been actually dissolved and a new arrangement contemplated, but not proved to have been actually effected, an injunction in respect of the further use of the partnership property was maintained. *Smith v. Danvers*, 5 Sandford, 669.

Where the defendant was under obligation to divide the produce of a farm with the plaintiff annually, it was held that an injunction, to restrain the former from dealing with the property, until a division was made, was improperly granted, there being no allegation of irresponsibility, but a mere fear expressed that

an accurate account would not be kept. *Newbury v. Newbury*, 6 How. 182; 10 L. O. 52; 1 C. R. (N. S.) 409.

An injunction cannot be obtained, by a single member of a class of persons having a common interest in the same subject-matter, in respect of an injury to such persons, as a class, in an action brought by such party, in his own name, and for his individual benefit. *Smith v. Lockwood*, 10 L. O. 12.

In the same case, reported 13 Barb. 209, 10 L. O. 232, it was held that the court will not interfere by injunction, to put down a public nuisance, which does not violate private rights of property, but only contravenes general policy. Nor will an injunction be granted to prevent the perpetration of an act prohibited by statute, because it might diminish the profits of a trade or business, carried on by the applicant in common with others.

In *Harrison v. Newton*, 9 L. O. 347, similar principles are laid down; and it was held that a party cannot obtain an injunction on grounds of the injury to the public, nor on a purpresture, unless the interest of the people imperatively require it. A private injury must be shown. It was also held that, to warrant an injunction, the plaintiff's interest must be clear: where his right is in any way doubtful, the court will not enjoin, unless the injury be clearly irreparable; nor will an injunction be granted, where the plaintiff has acquiesced, at any period, in the injury complained of.

The same principle, that no one can call for the redress of an injury to others, unless his own rights are invaded, is maintained in *Badeau v. Mead*, 14 Barb. 328. In *Parsons v. The Mayor of New York*, 1 Duer, 439, the court refused to restrain the erection and continuance of a lamp-post, alleged to be a general nuisance; on the ground that no special injury was shown, and that the matter rested in the discretion of the authorities, which would not be interfered with, unless that was proved.

Where, however, the remedy sought is to enforce the rights of the public, against a body generally responsible for the due performance of public duties, an injunction may be obtained, to stay an illegal act, by any parties individually interested in that due performance. A corporation may be held amenable for such an act, at the suit of any corporator. *Christopher v. The Mayor of New York*, 13 Barb. 567; *Milbau v. Sharp*, 15 Barb. 193; same case, 9 How. 102; *Stuyvesant v. Pearsall*, 15 Barb. 244; *The Attorney-General v. The Mayor of New York*, 12 L. O.

17; *Davis v. The City of New York*, 1 Duer, 451; *The People v. Compton*, 1 Duer, 512, affirmed by the Court of Appeals, in *The People v. Sturtevant*, 31st December, 1853.

But, where a corporation has not transcended the legal limits of its duty, and the question merely arises as to the due or undue performance of that duty, injunction will not be the proper remedy. *Betts v. The City of Williamsburgh*, 15 Barb. 255; *Bouton v. The City of Brooklyn*, 15 Barb. 375; *Thatcher v. Dusenbury*, 9 How. 32.

An injunction to restrain trustees under an assignment, when acting within the limits of their trust, was denied on similar grounds in *Prior v. Tupper*, and *Taylor v. Stephens*, 7 How. 415. Where, however, there is evidence of fraud, on facts admitted, though the fraud itself was denied, an injunction to restrain the proceedings of trustees was maintained. *Churchill v. Bennett*, 8 How. 309.

In *The People v. The Metropolitan Bank*, 7 How. 144, an interim injunction, to restrain the defendants from the transaction of their banking business, in a suit to test the validity of their receiving deposits in uncurrent money, was vacated, and a further injunction denied.

In the case of *Harrison v. Newton*, above noticed, and further reported 9 L. O. 311, 1 C. R. (N. S.) 207, it was held that, where a building in process of erection can be completed, without additional injury to the plaintiff, a temporary injunction will not be maintained, nor will an injunction be granted, where the rights of the parties are a matter of doubt.

In *Bennett v. The American Art Union Company*, 5 Sandf. 614, 10 L. O. 132, the following propositions are laid down with reference to the granting of injunctions; that objections to the right of a plaintiff to maintain a suit, cannot be so waived by the consent of the parties, as to deprive the court of the power, or release it from the duty of considering them; that a plaintiff is never entitled to an injunction, unless it is apparent that he has some interest, which may be injuriously affected by the act which he seeks to restrain; and that, where the plaintiff's claim arises from an illegal contract, to which he was a voluntary party, the maxim, "*in pari delicto, potior est conditio defendentis*" will apply, and his complaint must be dismissed.

The conclusion that the common law doctrine in England, as to the stopping of ancient lights, is abrogated in this country,

and that an injunction cannot be maintained on that ground, is laid down positively in *Myers v. Gemmel*, 10 Barb. 537.

A grossly oppressive agreement was set aside, and the defendant restrained from enforcing securities he had obtained through its means, in *Smedes v. Wild*, 7 How. 309.

### § 91. *Subsidiary Injunction.*

In relation to the subsidiary injunction in respect of matters in violation of the plaintiff's rights, but first arising during the continuance of the litigation, it seems, from *Hovey v. McCrea*, 4 How. 31, that not only must the act complained of necessarily be shown to have the tendency to render the judgment ineffectual, but that, in strictness, the necessity for such application must arise during the litigation. If existent at the commencement of the suit, it can only be properly applied for as part of the relief sought by the bill, on a prayer to that effect, in the usual form. See this same distinction drawn in *Malcolm v. Miller*, 7 How. 456.

In *Perkins v. Warren*, 6 How. 341, it was laid down, at general term, that an injunction of this last nature cannot be granted, when the act sought to be restrained has, in fact, been already done. It was likewise held that, where the statements on which such injunction is sought, are denied on oath by the defendant, and unsupported by other evidence, it could not be maintained. "It was like the well-settled equity practice, by which an injunction is dissolved, if the whole equity of the complaint is denied by the answer."

In *Olssen v. Smith*, 7 How. 481, it was held that, to obtain an injunction under the third clause of sec. 219, the affidavit must show a threat to remove the property during the pendency of the action; and, it appearing that the threats there in question were made before its commencement, an injunction could not be granted, the complaint containing no prayer for such relief, or statement to that end.

The statements as to the acts so done, and in respect of which a subsidiary injunction is sought, must be positive, and "facts and circumstances should be shown, so that the court can see that a fraud has been threatened, or is about to be perpetrated. This must be made to *appear* to the court, by the proper proof, and not by mere suspicion or belief. Injunctions are not issued

upon mere information and belief." *Pomroy v. Hindmarsh*, 5 How. 347. See likewise, *Roome v. Webb*, *Jones v. Atterbury*, and *Burkhardt v. Sanford*, above cited, and cases to the same effect, under the heads of Arrest and Attachment.

In *Brewster v. Hodges*, 1 Duer, 609, it was considered that the effect of an injunction of this nature, was not to restrain any removal or disposition whatever of the defendant's property, but only such a removal or disposition, with an intent to defraud creditors.

*Extraneous Injunction.*]—No case appears on the books, directly bearing on the granting of an extraneous injunction, *pendente lite*.

*Effect of Injunction as regards Interest.*]—The granting an injunction to restrain the payment of money to a third party, does not release the defendant from his liability to interest on that money, whilst so restrained; *McKnight v. Chauncey*, Court of Appeals, 12th April, 1853: he might, it was there held, have paid it to the plaintiff who was entitled to it, or into court, and, not having done so, was properly charged with interest.

## § 92. *Mode of Application for, Affidavits.*

The questions of general application, in relation to the granting or refusing of an injunction, having thus been considered, the mode of application for that purpose remains to be treated.

That application may be made as follows, under sec. 220 :

§ 220. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment ; upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

The question as to whether a verified pleading may or may not be made use of for the purpose of obtaining or dissolving an injunction, has been made the subject of considerable discussion ; and, as the cases in relation to such use, have a general bearing on applications for both purposes, they will be here considered in connection. The point, as to how far statements may or may not be inserted in a complaint, for the purpose of



grounding an application for an injunction, will hereafter be fully considered, under the head of Pleading, to which therefore the reader is referred.

A pleading, merely verified on belief only, under the form prescribed by the Code of 1848, was not sufficient of itself for the purpose of either application; *Benson v. Fash*, 1 C. R. 50; *Roome v. Webb*, 3 How. 327; 1 C. R. 114; the application must be made on a positive affidavit. In the latter of those cases, it was held that, if an affidavit were annexed to the complaint, in the form of the jurat by which a bill in chancery was formerly verified, it would be sufficient, and would make the complaint part of the affidavit, for the purpose of applying for an injunction.

In *Krom v. Hogan*, 4 How. 225, it was held that an answer, verified in the form prescribed by the present Code, was sufficient on which to ground a motion to dissolve an injunction, and might be treated as an affidavit in all respects; and this view is confirmed, in terms, in *Schoonmaker v. The Protestant Reformed Dutch Church of Kingston*, 5 How. 265.

In *Milliken v. Carey*, however, 5 How. 272, 3 C. R. 250, the contrary proposition was maintained, and it was held, that a verified complaint cannot be treated as an affidavit, for the purposes of such an application. "The terms pleading, and affidavit," said the learned judge, "have never been understood as synonymous. The Code has not confounded their meaning, or abolished their use, or given them any new definition. I don't feel at liberty to substitute a pleading, as the foundation of an order, where the law has expressly required an affidavit." See, also, *Servoss v. Stannard*, 2 C. R. 56.

This opinion, however, stands alone, and is controverted by the subsequent cases of *Smith v. Reno*, 6 How. 124; 1 C. R. (N. S.) 405; and *Minor v. Terry*, 6 How. 208; 1 C. R. (N. S.) 384. In the last, the doctrine upon the subject is stated in these terms: "In many cases, the facts are so stated, that no additional affidavit, beyond that verifying the complaint, will become necessary, except in cases where the plaintiff cannot swear to all the facts from positive knowledge. In such a case, it was always necessary to have the affidavit of a third person. It seems to me that, where the complaint states all the facts necessary to lay a foundation for the injunction, and the plaintiff swears to this positively, it is too narrow a construction of the

Code, not to regard the complaint, thus verified, as an affidavit. It would be an useless act to restate all the facts of the complaint over again in the form of an affidavit, and I cannot think the legislature intended it to be done." The decision in *Milliken v. Carey*, is there characterized as "founded on too great a refinement in the construction of the statute." See, also, *Florence v. Bates*, 2 Sandf. 675; 2 C. R. 110; and *Hascall v. Madison University*, 8 Barb. 174; 1 C. R. (N. S.) 170.

The sufficiency of a verified pleading, as an affidavit, under the statutory remedy as to a forcible entry and detainer, was maintained, on similar grounds, in *Porter v. Cuss*, 7 How. 441. An injunction founded on the complaint alone was sustained in *Churchill v. Bennett*, 8 How. 309; and, in *Furniss v. Brown*, 8 How. 59, another, grounded on a complaint held bad for misjoinder, was nevertheless directed to stand, in the event of the complaint being duly amended, according to the leave there given.

The point may therefore be looked upon as settled by preponderating authority, that a fully verified pleading may be used as an affidavit, on an application, either to obtain or dissolve an injunction. It must, however, be directly and distinctly sworn to. If not, the affidavits of third parties will, as heretofore, be necessary on which to ground the application. See *Smith v. Reno*, above cited.

The principle that the statements in the complaint must, of necessity, be distinct and positive, in order to the granting of an injunction, applies *à fortiori* to the affidavits of third parties, when introduced. Unless they possess those characteristics, they cannot avail, either for the purpose of maintaining or vacating an injunction. See *Pomroy v. Hindmarsh*, *Roome v. Webb*, *Jones v. Atterbury*, and *Burkhardt v. Sanford*, above cited, and the other cases there referred to. See also *Mann v. Brooks*, 7 How. 449; *Olssen v. Smith*, 7 How. 481.

To give any precedent in relation to the affidavits to be used on a motion for injunction, would of course be impracticable. The skeleton form of an order, will be found in the Appendix. Of course, the terms of the injunction itself, will necessarily depend upon the circumstances, and the relief sought, in each particular case.

When applied for at the outset of the action, the injunction will, of course, be *ex parte*, without any notice whatever to the

defendant, and the order may be obtained before service of, and may accompany the summons. The application, it would seem, may also be made *ex parte*, after the defendant has appeared, and before answer, unless the court prescribe the contrary, as to which see hereafter.

After answer, however, the injunction is no longer obtainable *ex parte*, but notice must be given, either in the usual form, or by order to show cause. The provision for this purpose is thus made by sec. 221:

§ 221. An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but, in such case, the defendant may be restrained, until the decision of the court or judge, granting or refusing the injunction.

Where the injury sought to be prevented is in actual progress, the order to show cause, with an interim stay of proceedings, will, of course, be the more advisable form in which to shape an application of this nature. Where the injury is not immediate, notice in the ordinary form may suffice.

In relation to the proof which may be made use of by the defendant, in resisting an application of this nature, see subsequent portion of the chapter, under the head of Motion to vacate.

*Security.*—Before, however, an injunction can be obtained under any circumstances, security must be given by the applicant. The following is the provision of the Code on the subject, as contained in sec. 222:

§ 222. Where no provision is made by statute, as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

The above provisions are generally applicable to all cases where the application is made before judgment, and supersede the provisions of the Revised Statutes in relation to such appli-

cations. Another class of injunctions, of a totally different nature, is provided for, and the security in relation thereto prescribed by art. V., title II., chap. I., part III., of the Revised Statutes, 2 R. S. 188 to 191; *i. e.*, those by which proceedings in an action are stayed, after judgment or verdict. In these cases, the amount found due to the plaintiff for debt and costs, will be required to be deposited by the party applying, in addition to the usual surety bond; with power, however, to the court to dispense with those securities, in cases where the judgment or verdict in question is impeached for actual fraud.

The security prescribed by the provisions of the Revised Statutes, must still be taken, in all cases to which those provisions apply. Sec. 222 only applies to cases in which no provision is made by statute relative to such security. In all others, the forms of the Revised Statutes must be complied with. *Cook v. Dickerson*, 2 Sandf. 691. In the same case, it is decided that a mere failure to perform a promise, is not such a fraud, as will authorize a judge at chambers in dispensing with the deposit and security above referred to.

In *Sheldon v. Allerton*, 1 Sandf. 700, 1 C. R. 93, the practice in the Superior Court, in reference to security upon injunctions, is stated as follows:

1. The undertaking under this section (222) must be approved and filed with the clerk of the court.

2. In general, an undertaking will be required on an order restraining the defendant temporarily, in connection with an order to show cause.

3. The plaintiff's own undertaking will not be received, unless he justify as being a freeholder and householder, and worth double the sum specified, above all his debts and liabilities.

4. A surety, when one is required, must justify in like manner.

5. A plaintiff residing out of the State, must give a resident surety, to obtain an injunction.

The form of an undertaking of this nature will be found in the Appendix. The amount specified should be fixed, with reference to the value of the matter in question, and must be sufficient. Where the sum is not large, it may be prudent to insert double the amount in the first instance; but the whole matter rests in the discretion of the judge, who may fix any proportion which may appear reasonable to him.

*Application on Notice, or Order to show Cause.*—An application for an injunction, whether *ex parte* or opposed, must in all cases be grounded upon security, as above. An *ex parte* application, even before answer, will not, however, in all cases be granted as of course. The following provision to the contrary is made by sec. 223:

§ 223. If the court or judge deem it proper that the defendant, or any of the several defendants, should be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may in the meantime be restrained.

In cases where the plaintiff's remedy is at all of a doubtful nature, this course will, in all probability, be adopted by the court. The argument on the merits of the injunction then comes on in due course, on the return of the order to show cause, but an interim restraint should not be forgotten to be provided for, where the injury is actually existent.

On service of an order of this nature, copies of the affidavits on which the injunction is applied for should be served with it, as on an ordinary motion.

*In Cases against Corporations* ]—The following special provisions are made by sec. 224, in relation to the granting of injunctions against corporations:

§ 224. An injunction to suspend the general and ordinary business of a corporation shall not be granted, except by the court, or a judge thereof. Nor shall it be granted, without due notice of the application therefor, to the proper officers of the corporation, except where the people of this State are a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, after the first day of January, one thousand eight hundred and fifty, as such proceedings are or shall be provided by law; unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain, by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

### § 93. *Service of Injunction.*

The order for the injunction, when obtained, must be duly served upon the defendant sought to be restrained, personally, the proceeding being one to bring a party into contempt. See sec. 418. Under sec. 220, as above noticed, a copy of the affidavit on which it is granted must be served with the injunction.

According to the old practice, it was necessary that, at the time of service, the original injunction should be shown to the defendant. This rule still holds good with reference to the injunction order. It must be so produced, and, if this be omitted, it will not suffice to found a proceeding for contempt, though it may be sufficient as a notice, for the purpose of saving the plaintiff's rights. *Coddington v. Webb*, 4 Sandf. 639.

The service of an injunction order on the attorney instead of the party, will be not merely insufficient for the purposes of enforcement, but positively irregular. *Becker v. Hager*, 8 How. 68. It will not, however, furnish any reason for setting aside the order.

The same is the case, with reference to an omission to serve with the injunction the papers upon which it was granted. *Penfield v. White*, 8 How. 87. The peculiar form of injunction in supplementary proceedings after judgment is, however, *sui generis*, and is not in anywise affected by the proceedings in this chapter, either as to service or otherwise. *Green v. Bullard*, 8 How. 313.

Where an injunction is directed against a corporation, it is binding, not merely on the corporate body, but also on the individuals composing it, who are equally liable for disobedience, as if they were named in the process. Service upon the Mayor of the City of New York, was accordingly held to be sufficient, to bind every member of the corporation, individually, whose personal action, as such, the order was designed to control, and to render such members individually liable for a contempt, for acts of disobedience to that order. *Davis v. The City of New York*, 1 Duer, 451. A party standing in that capacity may be so punished, when he has designedly done an act of this description, knowing that such an order had been granted, although, at the time, it had not been served or entered. *The People v. Compton*, 1 Duer, 512, affirmed by the Court of Appeals in *The People v. Sturtevant*, 31st December, 1853.

Where the injunction is founded on the complaint, as usually the case, it will, of course, be the most convenient practice to serve the summons at the same time, and annexed to the copy complaint served with the injunction. It will not be necessary, in this case, to make an additional copy of the latter, though in strictness it is used in a double capacity. Nor, when the injunction has been granted on notice, and the complaint has been previously served in the action, will it be necessary to re-serve the latter as an affidavit. A notice should however accompany the order, that it is granted upon the complaint, of which a copy has been already served, as well as upon the other papers which may accompany it.

### § 94. *Defendant's Course in order to oppose or vacate.*

*Where Plaintiff moves on Notice or Order to show Cause.]—*

The defendant will be entitled to oppose the granting of the motion, on his answer, if sworn to, and likewise on supplementary affidavits; or on the latter alone, if thought expedient, or if the answer be not ready. If new matter, in avoidance of the plaintiff's case, be set up by the answer or affidavits, the plaintiff will be entitled to introduce affidavits in reply to such new matter. The affidavits in question must, however, be strictly confined to such new matter. If the answer be merely responsive, it cannot be contradicted on affidavit; *Florence v. Bates*, 2 C. R. 110; 2 Sandf. 675; and, where the legal right of the plaintiff is denied, either by the answer or by affidavit, as broadly as it is asserted, the application stands on the same ground, and should be governed by the same rule, as where the whole equity of the complaint is denied by the answer; under which circumstances, according to the well-settled Equity practice, the defendant is entitled to have the injunction dissolved. *Perkins v. Warren*, 6 How. 341.

*Motion to Vacate.]—*Where an injunction is granted upon notice, a motion to vacate or modify it, will not, under ordinary circumstances, be granted; though, on allegations of surprise, fraud, or of an altered state of circumstances, applications of this nature may be entertainable. Where, however, the order has been granted *ex parte*, a motion to vacate may be made in

all cases. The following is the provision of the Code upon the subject, sec. 225:

§ 225. If the injunction be granted by a judge of the court, or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint, and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

This application cannot be entertained without notice, under any circumstances. Where an immediate dissolution is sought, an order to show cause will be the proper form; where time is not so much an object, an ordinary notice will suffice.

The law as to the circumstances under which an injunction will or will not be maintained, on a motion to vacate or dissolve it, is not affected by the Code, but remains substantially as under the late practice. The elementary treatises on the subject, and also as to injunctions in general, should accordingly be consulted, the present observations being, as in other cases, strictly confined to the practice under the recent measure.

It has been held that, notwithstanding the provisions of sec. 324, that an order made out of court, without notice, may be so vacated or modified by the judge who made it, a motion to dissolve an injunction cannot be thus made. These provisions are controlled by the section last above cited, under which notice is requisite in all cases. *Mills v. Thursby*, 1 C. R. 121. In the subsequent case, however, of *Bruce v. The Delaware and Hudson Canal Company*, 8 How. 440, this conclusion was dissented from, and the court held that the special provision made as above was in addition to, and not in substitution for the powers in sec. 324. The court held, therefore, that it was competent for a judge to vacate or modify an injunction order without notice, but that it was not the better practice, and should never be done unless under the most urgent circumstances.

The motion to vacate or modify, may either be grounded on an alleged defect or irregularity in the plaintiff's proceedings, or on an adverse equity set up by the defendant. In the former case, the application should be grounded on the papers served by the plaintiff, and on them alone. Under these cir-



cumstances, affidavits will be inadmissible on either part, and the question will be brought on, on those papers, and on the notice of motion or order to show cause alone, without any counter evidence.

The form of the usual notice of motion to vacate an injunction, will be found in the Appendix. Where a modification is sought alone, the terms of the notice will of course depend upon the peculiar circumstances. To give precedents for the affidavits to be used for either purpose, would be clearly impracticable.

In *Osborn v. Lobdell*, 2 C. R. 77, it was considered that, on moving to dissolve an injunction obtained without notice, the defendant must furnish proof of the existence of the suit, and of the proceedings in it. This decision is, however, distinctly overruled in *Newbury v. Newbury*, 6 How. 182, 1 C. R. (N. S.) 409, and is clearly at variance with the well-established principle that, in motions grounded upon the pleadings or proceedings in a suit, no formal proof of their existence will be required. Where an order is taken by default, such formal proof may possibly be requisite; but, where the opposite party appears, it is clear that he cannot properly object, and, above all, to the reading of papers actually served by himself. See *Darrow v. Miller*, 5 How. 247, 3 C. R. 241, and other cases cited under the heads of Pleading and Motions.

*Affidavits on Motion.*]—Although, where the motion is solely on the ground of irregularity, it will be heard on the original papers alone, as above noticed; under ordinary circumstances, the application will be more or less grounded on a counter case made out by the defendant, which case may be presented on his answer and affidavits in support, or on either, standing alone. The following provision is made by sec. 226, in relation to the rights of the plaintiff under these circumstances:

§ 226. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

In *Servoss v. Stannard*, 2 C. R. 56, it was held that, where a defendant moves to dissolve an injunction, on complaint and answer alone, the plaintiff cannot introduce affidavits or other

proofs in opposition, in addition to those on which the injunction was granted. The same doctrine was held in *Hartwell v. Kingsley*, 2 C. R. 101, 2 Sandf. 674, and further, that the plaintiff's reply was equally inadmissible in such case. See, also, *Milliken v. Carey*, and *Benson v. Fash*, before cited.

This principle doubtless applies to those cases, in which the whole equity of the complaint is denied by the answer. Where, however, such is not the case, the answer, if used as an affidavit only, may probably be contradicted. *Roome v. Webb*, *Krom v. Hogan*, *Hascall v. The Madison University*, *Florence v. Bates*, *Smith v. Reno*, and *Minor v. Terry*, above cited, clearly lay down the doctrine that, in a general point of view, a duly verified pleading must be looked upon in the light of an affidavit, and may be so read; and that it is competent for the plaintiff to introduce affidavits on his part, in opposition to the statements contained in a pleading so made use of, in addition to those on which the injunction was granted.

In relation to the effect of a traverse of the plaintiff's case by the defendant, where the matter simply rests on the contending affidavits of the parties, and of the impossibility of maintaining a provisional injunction under these circumstance, see *Perkins v. Warren*, 6 How. 341, and, *à fortiori*, is this the case, when an answer has been put in, denying the whole of the plaintiff's equity. *Florence v. Bates*, 2 Sandf. 675, 2 C. R. 110, above noticed.

The denial, however, must be full, specific, and must cover the whole ground. Thus in *Litchfield v. Pelton*, 6 Barb. 187, it was held that a general denial of fraud by a defendant, cannot be urged successfully against an order for an injunction, where facts are admitted, from which, the court or a jury may properly infer a fraudulent intent. The injunction, in such a case, should be retained until final judgment. See the same principles, as laid down in the subsequent case of *Churchill v. Bennett*, 8 How. 309.

The plaintiff is at liberty to fortify his original claim for an injunction, as set out in the complaint, by additional affidavits. He cannot, however, enlarge that claim, or prefer others. *Hentz v. Long Island Railroad Company*, 13 Barb. 646.

Where the injunction has been granted on the ground of a fraudulent disposition of property, the only question on the motion to vacate, will be, as to the intent of that disposition;

affidavits denying the debt sworn to by the plaintiff cannot properly be received. *Brewster v. Hodges*, 1 Duer, 609.

*General Course of Proceeding on Motion to vacate.*]—An order, continuing, modifying, or vacating an injunction, or granting one on notice, is, of course, reviewable by the general term. It cannot, however, be carried up to the ultimate tribunal, being a matter exclusively resting in the discretion of the court below. See *Vandewater v. Kelsey*, 1 Comst. 533, 3 How. 338, 2 C. R. 3; *Selden v. Vermilya*, 1 Comst. 534, 3 How. 338, 1 C. R. 110. See, also, *Genin v. Tompkins*, 1 C. R. (N. S.) 415.

If the injunction be vacated or modified, a copy of the order must, of course, be served by the defendant, on the adverse attorney. If, on the contrary, the application be refused, or omitted to be made, the injunction remains in force until the hearing of the cause, when, if the plaintiff's right to continued relief of this nature be made out, it will form part of the decree to be made. Of course, a decree of this nature finally discharges the sureties under sec. 222, from all liability under their undertaking.

In *Furniss v. Brown*, 8 How. 59, an injunction granted on a complaint held bad for misjoinder, was, nevertheless, conditionally continued, in the event of the plaintiff's amending according to the leave given.

*Reference to ascertain Damages.*]—In the event of an injunction being finally dissolved, and of the defendant being entitled to damages in respect of its original granting, such claim must be asserted by action in the ordinary form. The leave of the court should be applied for, in the first instance. See *Higgins v. Allen*, 6 How. 30.

Where a reference has been obtained, as to the amount of damages by reason of an injunction, the report must be confirmed, (by motion at special term,) before the court can entertain an application, to prosecute the undertaking given upon the issuing of that injunction. *Griffing v. Slate*, 5 How. 205; 3 C. R. 213.

In estimating the damages sustained by an injunction, counsel fees for defending the suit, and moving to dissolve, may properly be included. *Coates v. Coates*, 1 Duer, 664. If the injunction be sustained, the defendant will, on the contrary, be liable for

interest on money retained in his hands, where he might have paid it over to the plaintiff or into court. *McKnight v. Chauncey*, Court of Appeals, 12th April, 1853.

### § 95. *Violation of Injunction.*

So long as an injunction remains in force, the defendant is bound to obey it, and any act of disobedience on his part will render him liable to an attachment for contempt, in the usual form, as under the old practice; and no application to vacate or modify the order can, as a general rule, be entertained, whilst he is under the operation of an attachment so issued.

In *Krom v. Hogan*, 4 How. 225, it is laid down with reference to this subject; 1. That a defendant enjoined, cannot plead that he acted by the authority of a third person, though alleging that such person had become entitled to do the act complained of, as a defence against an application for an attachment against him for disobedience; and, 2. That it is a sufficient answer to a motion to vacate an injunction, that the defendant is in contempt for disobeying it.

In *Capet v. Parker*, 3 Sandf. 662, 1 C. R. (N. S.) 90, it was similarly laid down, that no advice of counsel, and not even the declaration of the judge of an inferior court, can justify a party in disobeying an injunction order; and, if he does, an attachment will issue.

In *Grimm v. Grimm*, 1 C. R. (N. S.) 218, it was held, as in *Krom v. Hogan*, that, where an injunction has been granted on notice, and disobeyed, the court will not review the propriety of granting the injunction in the first instance, on motion for an attachment against the defendant. If the original order was erroneous, he should have appealed from it; but, having submitted to the order in the first instance, he was bound to obey it.

An appeal from an order granting an injunction, does not stay the operation of the injunction, pending the appeal; notwithstanding which, an attachment will issue to punish the party enjoined, for any violation of that order, whilst it remains unreversed. *Stone v. Carlan*, 2 Sandf. 738; 3 C. R. 103.

The case of *Smith v. Austin*, 1 C. R. (N. S.) 137, is, to a certain degree, in conflict with the decisions last cited. It was there held that a defendant, who had violated an injunction order,

might yet move to vacate the original order, on the ground that it had been improperly made in the first instance. This conclusion seems open to considerable doubt, and to be overbalanced by the weight of authorities to the contrary; but, even if it be sound, it seems clear that a defendant, whilst in contempt, cannot move to vacate, on any other ground than that of the original invalidity or irregularity of the order; and that to submit to an injunction, however granted, whilst that injunction remains unreversed, is the only really proper or prudent course.

In *Ross v. Clussman*, 3 Sandf. 676, 1 C. R. (N. S.) 91, although the court said they did not intend to decide, whether simply confessing a judgment was a violation of an injunction, restraining a debtor from disposing of his property; it was held that, if such confession be made with the intent to change the disposition of the property to the creditor's prejudice, and has that effect, it will be a violation of the injunction, and punishable accordingly. The defendant, in that case, was accordingly fined in the whole amount of the plaintiff's claim, with costs, counsel fee, and expenses, and was committed until the fine was paid.

In *Furniss v. Brown*, 8 How. 59, a reference was granted to take testimony in relation to an alleged violation of an injunction, before any final action was taken thereon. The same course was adopted in *The People v. Compton*, 1 Duer, 512; and, on such a reference, the defendant, it was held, is bound to answer all such interrogatories as may be propounded to him.

The course to be pursued for the enforcement of an injunction by process of contempt, will be found considered at very great length, in that case, and on its affirmance by the Court of Appeals, in *The People v. Sturtevant*, Court of Appeals, 31st Dec., 1853. See, likewise, *Davis v. The Mayor of New York*, 1 Duer, 451. The subject of process of that nature will be fully considered in a subsequent chapter, under the head of Execution.

## CHAPTER IV.

## ATTACHMENT.

§ 96. *Nature of Remedy.*

THE provisions of the Code in respect to this important remedy are, in their general spirit, a reënactment, or rather a fusion, of those contained in different portions of the Revised Statutes, in relation to the remedies thereby granted against the property of foreign corporations, or of absconding, concealed, or non-resident debtors, though with several most important modifications.

The statutory provisions on the former subject, will be found in art. I., title IV., chap. VII. of part. III., sec. 15 to 36 inclusive, (2 R. S. 457 to 462;) and those as to the latter, in art. I., title I., chap. V., part II. (2 R. S. 1 to 15.) See also art. II. of the same chapter, in relation to debtors confined for crimes.

A similar remedy exists on suits in justices' courts. See 2 R. S. 230 to 233. See also *Colver v. Van Valen*, 6 How. 102; *Bennett v. Brown*, 4 Comst. 254; 1 C. R. (N. S.) 267; *Rosenfield v. Howard*, 15 Barb. 546. The machinery in relation to the former of the subjects above mentioned, appears to have been the chief guide taken in the framing of that portion of the Code now under consideration, and has been closely followed, the necessary changes being introduced, to make those provisions applicable to attachments of whatever nature.

The provisions in relation to attachments against absent or absconding debtors are, on the contrary, for the most part, swept away, particularly those in relation to the management of the property, when seized, by trustees; and those under which an attachment, when issued, was rather a proceeding for making a debtor's property available for his creditors in general, than a mode of obtaining a preferential remedy, by means of superior diligence on the part of the applicant. The creditor, under the Revised Statutes, seized for the benefit of his class; under the Code, his remedy is exclusive, and for his own benefit alone. It

constitutes, in fact, a species of anticipated seizure on execution, under which the most diligent attains the greatest advantage. In *Fraser v. Greenhill*, below cited, a disposition was shown to neutralize the evident intent of the Code, as above stated, and to enable creditors, not parties to the suit in which an attachment is issued, to have themselves brought in as parties, by amendment, so as to give them the same benefit, as members of a class, which was secured to them by the Revised Statutes; but this view seems untenable, and to be overruled, as below noticed.

### § 97. *From whom, and how obtainable.*

The provision of the Code, defining the cases in which this remedy may be obtained, is contained in sec. 227, and runs as follows:

§ 227. In an action, for the recovery of money, against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself as hereinafter mentioned; the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendants attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

The officers to whom such application may be made, and the evidence on which it must be grounded, are thus pointed out by secs. 228 and 229:

§ 228. A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 229. The warrant may be issued, whenever it shall appear by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent.

The whole of these provisions were first inserted, as an amendment, in the Code of 1849.

*Jurisdiction of Officers.*—A court of limited jurisdiction has no power to issue an attachment against a non-resident debtor,

unless such debtor have been served with process within its limits. Where, however, a resident debtor absconds or conceals himself, and the application is made on that ground, it will be maintainable. *Fisher v. Curtis*, 2 Sandf. 660; 2 C. R. 62, above cited; *Perry v. Montgomery*, 2 Sandf. 661; *Cole v. Kerr*, Id.; nor will the subsequent appearance and answer of the defendant cure the defect, as regards the original attachment. The setting it aside under this last state of circumstances, will not, however, prejudice the continuance of the suit, or the issuing of a second attachment. *Cole v. Kerr*, above cited. The above decisions were in relation to the jurisdiction of the Superior Court under such circumstances. And, in cases of this description, every fact necessary to confer jurisdiction must be affirmatively shown, by direct and positive allegation, and not by inference, however clear. See *Payne v. Young*, Court of Appeals, 19th April, 1853.

In *Granger v. Schwartz*, 11 L. O. 346, it was held that the Superior Court had no jurisdiction of actions upon contracts, when all the defendants were non-residents, and no service had been made on any of them. An attachment, issued against the property of parties under these circumstances, on an affidavit that all were non-residents, was held to be void. Where, however, the summons has been served on any one of several defendants, jointly interested, the court will then have acquired jurisdiction under sec. 33, and the attachment will be good for all purposes. Where, therefore, the Superior Court has once acquired jurisdiction of the suit, by service on one of several joint debtors, it has full cognizance of the cause for all purposes, and an attachment may be issued against the property of others non-resident. In such a case, there is no longer any distinction between its powers and those of the Supreme Court. *Anon.*, 1 Duer, 662.

The above principles will likewise, of necessity, hold good with regard to the Court of Common Pleas of New York. The mayor's and recorder's courts of cities seem, as a general rule, to have no jurisdiction whatever against non-residents. See sec. 33, above noticed.

The powers of the justices of the Supreme Court are, however, unfettered by any restrictions of the above nature, and, therefore, in all cases in which the jurisdiction of the local courts is not clearly acquired at the time of the application, that tribunal



will be the more convenient forum of application; as likewise in all cases where the attachment is sought to be enforced in more than one county, or in any county out of the limited jurisdiction.

A non-resident plaintiff labors under no disability in this respect, but may apply for and obtain an attachment under the Code, in the same manner as if he were a resident; though, it seems, the law was otherwise under the Revised Statutes. *Ready v. Stewart*, 1 C. R. (N. S.) 297. In courts of limited jurisdiction, however, he cannot sue non-resident defendants. See *Payne v. Young*, above cited. *Ready v. Stewart* is also authority that an attachment is issuable against property of a non-resident debtor within the State, although both the parties reside, and the cause of action arose, in another State. This doctrine is, though, only applicable to the Supreme Court.

This rule does not, however, hold good in relation to a foreign corporation suing another, unless the cause of action has arisen, or its subject be situate within this State. *Western Bank v. City Bank of Columbus*, 7 How. 238. See, also, *Eggleston v. Orange and Alexandria Railroad Company*, 1 C. R. (N. S.) 212.

*Relation to Summons.*]—By sec. 227, as above cited, the application for an attachment may be made, “at the time of issuing the summons or at any time afterwards.”

This issuing has no reference to the time of the actual service. The summons will, for the purposes of an attachment, be considered as “issued,” if made out and placed in the hands of a person authorized to serve it, and with a *bonâ fide* intent to have it served. Nor is it necessary, with this view, to deliver it to the sheriff with or before the attachment; but it may be served by any other person, in the usual manner. *Mills v. Corbett*, 8 How. 500.

The summons must, however, be actually issued at the time of the application, or the court will not have jurisdiction; though it is not necessary to state that fact on the affidavits on which the application is made, provided the fact be so, and be capable of being subsequently shown. *Conklin v. Dutcher*, 5 How. 386; 1 C. R. (N. S.) 49.

It has been held by the Superior Court, that an attachment issued before actual service of the summons was irregular. See *Fisher v. Curtis*, 2 Sandf. 660; 2 C. R. 62. This conclusion is

grounded upon the provision, that such attachment can only be issued in "an action," and on jurisdictional views as regards the limitation of the powers of that court, to cases in which the necessary conditions as to residence, or service within its limits, have been previously performed. As regards cases in the Supreme Court, it seems clearly untenable, as it nullifies, in effect, the provision that an attachment may be granted "at the time of issuing the summons."

The summons should not merely be issued, but it should also be served, either collaterally with, or as soon as possible after the application. An order for publication will, for the most part, afford the proper course to be pursued in this respect, and such order may be applied for simultaneously with the attachment, and, unless under special circumstances, upon the same affidavits, the additional facts necessary to ground an order for publication being shown upon them. See this subject heretofore considered under the head of Summons; or, if thought advisable, additional or separate affidavits may be used.

In *Hulbert v. The Hope Mutual Insurance Company*, 4 How. 275, affirmed on appeal, 4 How. 415, service on the president of a foreign corporation, temporarily within the State, was held to be good service, and to afford sufficient notice to such corporation, that proceedings were about to be instituted against its property. Service on a managing agent of such a corporation within the State, will be good; but void, if made on a special agent with limited powers only. *Brewster v. Michigan Central Railroad Company*, 5 How. 183; 3 C. R. 215. In a case of this last description, therefore, an order for service by publication will be essential.

In *Hernstein v. Mathewson*, 5 How. 196, 3 C. R. 139, it was held that, "in an action for wrong, against a non-resident defendant, an attachment might be issued, and the defendant's property levied under it," as well as where the action is on contract; but that, in the former case, unless the defendant could be personally served, or voluntarily appeared in the suit, the plaintiff had no remedy, because service by publication could not be made in such an action; and, if such service fail to be made, it will be proper to discharge the attachment, because it could be of no avail to the plaintiff, unless the defendant voluntarily appeared. This defect is cured by the last amendment, under which, service by publication is now admis-

sible in all cases. Where, however, such an order cannot be obtained, and yet personal service cannot be made, the principle here laid down might apply; and, after a reasonable time allowed, an attachment, unaccompanied or not followed up by service of the summons, might be held to be no longer maintainable.

The issuing of an attachment is a sufficient commencement of a suit, for the purpose of conferring jurisdiction, and an action, so commenced, will not be defeated by the subsequent death of the defendant, before the expiration of an order for publication, but may be continued against his representatives. *Moore v. Thayer*, 10 Barb. 258; 6 How. 47; 3 C. R. 176. See the same doctrine confirmed, and a creditors' lien under an attachment sustained; though subsequent irregularities were alleged, but which the court held must be taken advantage of by motion, and could not be attacked collaterally. *Burkhardt v. Sanford*, 7 How. 329. See, likewise, *Mills v. Corbett*, 8 How. 500; *Thompson v. Dickerson*, 12 Barb. 108; *In re Griswold*, 13 Barb. 412. For this last purpose, the regularity of the attachment is not a jurisdictional question. The issuing that process is not a commencement of the action, so far as regards ulterior proceedings therein, but merely a provisional remedy.

*Against Foreign Corporations.*—The powers of the court in this respect are limited by the provisions of sec. 427. Where, therefore, both plaintiff and defendant were foreign corporations, and the cause of action arose and its subject remained elsewhere, an attachment was held not to be maintainable. *Western Bank v. City Bank of Columbus*, 7 How. 238. See, likewise, *Eggleston v. Orange and Alexandria Railroad Company*, 1 C. R. (N. S.) 212.

*Against Non-resident Debtors.*—The cases on this subject are more numerous, and involve a greater variety of questions.

Actual non-residence, without regard to the domicile of the debtor, is what is contemplated by the statute. Where, therefore, a debtor went to a foreign state, and remained absent for three years, he was held to be a non-resident within the meaning of the statute, though he had all the time intended to return to the country. *Haggart v. Morgan*, 4 Sandf. 198, affirmed by the Court of Appeals, 1 Seld. 423. See, likewise, a similar dis-

inction between residence and domicile, as drawn in *Bartlett v. The Mayor of New York*, 5 Sandf. 44. See, also, *Clason v. Corley*, 5 Sandf. 454.

Where a party, originally a resident in the State, had afterwards emigrated to Indiana, and, having returned, was living in his father-in-law's family in New York, looking out for an opportunity to get into business, but as yet undetermined where he should finally settle; the court, both at special and in general term, decided that he was a non-resident within the meaning of the foregoing section, and refused to discharge an attachment issued against his property. *Burrows v. Miller*, 4 How. 349.

The question of non-residence has been already considered under the head of Service by Publication, sec. 45. See that section and the analagous cases there cited. See, also, the previous division of the present section in relation to an action by one non-resident corporation against another. See, likewise, the case of *Rosenfield v. Howard*, 15 Barb. 546, cited in the next division of this section.

An attachment against partnership property, was held to have been regularly issued as against non-resident partners, although one of the members of the firm was resident within the State, and had been there served with process. *Brewster v. Honigsburger*, 2 C. R. 50.

In *Bird v. Walker*, 12 Barb. 298; 1 C. R. (N. S.) 329, an attachment issued against a non-resident partner was likewise maintained.

The same was done by the Superior Court in *Anon.*, 1 Duer, 662, it being further held that, where that court had once acquired jurisdiction of the suit, by service on the resident partner, its powers in relation to the property of non-residents were the same as those of the Supreme Court.

Though issuable, the effect of such an attachment is however limited, and will only be good as against the interests of the absent partner. Partnership property, in the hands of those who are resident, cannot be seized under it. It is only the individual interest which is liable to seizure. *Stoutenburgh v. Vandenburg*, 7 How. 229; *Sears v. Gearn*, 7 How. 383. See, likewise, *Travis v. Tobias*, 7 How. 90.

This remedy cannot either be maintained against the property of a joint debtor, who has not been served with process, in proceedings against him as a joint debtor, founded on a judgment

obtained against the partnership, by service on another of its members. An action must, in such case, be duly commenced against him personally, grounded on a proper statement of the circumstances, and not on the judgment alone. *Oakley v. Aspinwall*, 4 Comst. 513. See, also, 10 L. O. 79, 1 Duer, 1.

In relation to a statement as to a departure from the State, made on mistaken grounds, see *Gilbert v. Tompkins*, 1 C. R. (N. S.) 12, cited under the next division of this section.

*Against absconding or concealed Debtors.*—In *Morgan v. Avery*, 7 Barb. 656, 2 C. R. 91, affirmed on appeal, 2 C. R. 121, the law as to the statements, which will suffice to establish that the defendant has departed with intent to defraud his creditors, or to avoid service of a summons, is laid down as follows. It is not necessary that such departure should have been made by the defendant secretly, as under the Revised Statutes: "If he have departed ever so openly, it will be enough, if the required intent is made out." After stating the facts of the case, which showed that such departure, in that instance, was not secret, but was nevertheless made under circumstances of considerable embarrassment, and some suspicion, the learned judge proceeds as follows: "I repeat that no imputation of an intent to defraud his creditors necessarily follows from the facts of the case, nor is it necessary to cast any such imputation, in order to sustain the attachment."

"If, finding himself irretrievably involved, so that his failure must soon happen, he has desired to be out of the way of his creditors at the time it should happen, although he had left all his property behind him, and although he was desiring to get into other business, whereby he might ultimately retrieve his affairs, the inference may very properly be drawn, that he departed the State with intent to avoid the service of a summons. Such, at all events, seems to me to be the highest probability in this case, and I cannot, therefore, feel myself warranted in setting aside the attachment as improvidently issued."

In the Superior Court, however, a more restricted view is taken as to the propriety of granting this species of remedy, and, under very similar circumstances to those reported in *Morgan v. Avery*, an attachment has been refused; but an order for service by publication granted, on an application for both remedies on the same affidavits.

In *Camman v. Tompkins*, 1 C. R. (N. S.) 12, the law on the

subject of concealment of a defendant, is laid down *in extenso*. The defendant, in that case, after his insolvency became manifest, had remained out of the way a few hours, until he had succeeded in completing a disposition of his property without molestation from his creditors, and then returned to his house, and delivered himself up to an officer who held a warrant to arrest him. The learned judge held that this was a sufficient concealment to bring the case within the provisions of this chapter. "It is not necessary that a summons should have issued, and an ineffectual attempt to serve it made. It was enough, if the party intentionally so disposed of himself, that one could not have been served." "It is concealment, to avoid the service of process, no matter whether for an hour, a day, or a week; no matter whether with a view to defraud creditors, or merely to have time to make a disposition, lawful or otherwise, of his property, before his creditors got at him. It is placing himself designedly, so that his creditors cannot reach him with process; and that, it seems to me, is clearly the concealment which the statute contemplates."

In *Genin v. Tompkins*, 12 Barb. 265, the above doctrine was sustained to the full extent by the general term, on appeal from the foregoing and two other collateral decisions.

In *Gilbert v. Tompkins*, 1 C. R. (N. S.) p. 16, where the plaintiffs had, in their affidavits, stated the facts on which they applied for an attachment, but had drawn a wrong conclusion from those facts, inferring that the defendant had departed the State, whereas he had actually concealed himself within it, the attachment issued on those affidavits was sustained, as being warranted by the facts themselves, without the inference.

In *Rosenfield v. Howard*, 15 Barb. 546, an affidavit, of a similar nature to the above, was held to be a sufficient statement to authorize the issuing of a justices' attachment, on the ground of an intended fraudulent disposal of property, and to prevent a reversal of his proceedings for insufficiency of proof.

In relation to the averments which would or would not have been sufficient to warrant the issuing of an attachment, on similar grounds, under the Revised Statutes, see *Castellanos v. Jones*, 1 Seld. 164.

### § 98. *Form of Affidavit.*

The skeleton form of an affidavit on which to ground an application for an attachment, will be found in the Appendix.

The statement of facts will, of course, vary according to the circumstances. It must be clearly shown upon such affidavit, 1st. That a cause of action exists, specifying the amount and grounds of claim; and 2d. That the defendant comes within some one or more of the different categories pointed out in sec. 229. The chapter on summons, and the cases there cited in relation to the analogous remedy of service by publication, may be advantageously referred to, as regards the preparation of these affidavits. Of course the utmost care must be taken, and the terms of the statute must be throughout strictly complied with, or jurisdiction will not be conferred. A mere allegation in the words of the statute will not suffice; facts must be stated in all cases. See *Frost v. Willard*, 9 Barb. 440, and other cases to that effect, cited in the preceding chapters.

In *Conklin v. Dutcher*, 5 How. 386, 1 C. R. (N. S.) 49, it was, however, held to be the rule that, "if enough is set forth in the affidavit, to call upon the officer for the exercise of his judgment upon the weight and importance of the evidence, it is sufficient. It is only where there is a total want of evidence upon some essential point, that the officer will fail to acquire jurisdiction. (4 Hill, 602; 20 Wendell, 77.)" See similar principles laid down with reference to a justice's attachment, in *Rosenfield v. Howard*, 15 Barb. 546.

Where, however, the affidavits were clearly insufficient to bring the case within the terms of the statute, an attachment issued under the Revised Statutes was held to be void, and to be no protection to an officer acting under it. *Castellanos v. Jones*, 1 Seld. 164. See, also, *Staples v. Fairchild*, 3 Comst. 41, and *Payne v. Young*, below cited.

Where the application is made to a court of limited jurisdiction, the facts necessary to confer that jurisdiction must be affirmatively shown, by special allegation, and not by inference only. Where therefore an attachment of the nature last alluded to had been issued against a non-resident defendant, and the plaintiffs, though described in the petition, as "of the City of New York," were not affirmatively alleged in the petition itself, or by affidavit, to be residents, it was held that jurisdiction was not conferred, and that the proceedings were void. *Payne v. Young*, Court of Appeals, 12th April, 1853.

The sufficiency of the affidavits on which an attachment is issued under the Code is not, however, a jurisdictional question,

so as to enable its regularity to be impeached in a collateral proceeding. In *Re Griswold*, 13 Barb. 412. See also *Morgan v. Avery*, above cited and there referred to. See, likewise, *Burkhardt v. Sanford*, *Mills v. Corbett*, and *Thompson v. Dickerson*, noticed in the previous section.

In *St. Amant v. De Beuxcedon*, 3 Sandf. 703, 1 C. R. (N. S.) 104, the general requisites of the affidavit on which an attachment may be obtained, are thus stated by the general term of the Superior Court: "We consider it proper, in a remedy of so grave a character as this; the attachment, in effect, tying up the entire property of a party pending a suit; that the affidavit upon which the proceeding is authorized, should be explicit, and made in general upon positive knowledge of the deponents, so far as to establish a *prima facie* case. In general, there is no difficulty in obtaining the affidavits of the persons who give the information on which the plaintiff desires to proceed; and, when such affidavits cannot be obtained, from the peculiar circumstances of the case, those circumstances must be stated, with all the grounds of suspicion, so as to satisfy the judge that the facts exist on which the attachment is sought, and that the plaintiff has produced the best evidence in his power to establish them."

In *Camman v. Tompkins*, 1 C. R. (N. S.) 12, and *Gilbert v. Tompkins*, 1 C. R. (N. S.) 16, the same principle is thus laid down: that "The grounds of the belief of the party must be set out, so that the judge who issues the warrant may have such belief, and the court may be able to determine whether it be well grounded."

If, too, sufficient facts are stated, an erroneous inference drawn from them, as to the precise complexion of those facts, will not vitiate the proceeding. *Gilbert v. Tompkins*, above noticed. See this subject fully considered, and various cases cited, (establishing the same principles as to the statements on which the belief of the party must be based, in order to an affidavit of that nature being receivable,) in the previous chapters of this portion of the work, under the analogous heads of Arrest and Injunction.

### § 99. *Security on Application.*

The plaintiff must also be prepared with security at the time of such application, under sec. 230, as under :



§ 230. Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect, that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

The form of this undertaking will be found in the Appendix. It will be good, even if made in the form of a penal bond, provided it contain the conditions here required, and be otherwise regular; and any mere formal defects will be cured by amendment. *Conklin v. Dutcher*, 5 How. 386, 1 C. R. (N. S.) 49.

### § 100. *Warrant of Attachment.*

The affidavits and security being prepared, application should be made to a judge, or county judge, as above prescribed, for a warrant of attachment. The form of this document is prescribed by sec. 231, as follows:

§ 231. The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time, to the sheriffs of different counties.

See Appendix for form.

In *Camman v. Tompkins*, 1 C. R. (N. S.) 12, it was held that the warrant is process in the progress of the cause, and must, as such, be issued in the ordinary form, and under the seal of the court.

In *Genin v. Tompkins*, however, 12 Barb. 265, this view was overruled by the general term of the same court, in the same and other cases, and it was held, that the signature of the judge is all that is necessary; that a formal *teste*, the signature of the clerk, and the seal of the court, are not requisite; but that the signature of the plaintiff's attorney ought to be required. It was also held, that no return-day need be inserted in the warrant. If more than one warrant is required, dupli-

cates should be prepared, and the judge's signature obtained thereto.

The warrant, when obtained, must be lodged with the sheriff of the county, the affidavits on which it was issued being filed with the clerk of the court. It is important that the former should be done with all speed, where real estate is sought to be seized, the priority of the liens, on the same property, being determined by the order in which they are lodged with the sheriff. See *Learned v. Vandenburg*, below cited.

### § 101. *Sheriff's Proceedings on Warrant.*

The duties of the sheriff thereon, are thus prescribed by secs. 232 to 236, inclusive:

§ 232. The sheriff, to whom such warrant of attachment is directed and delivered, shall proceed thereon, in all respects, in the manner required of him by law, in case of attachments against absent debtors; shall make and return an inventory, and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall, subject to the direction of the court or judge, collect and receive into his possession, all debts, credits, and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name, or in the name of such defendant, as may be necessary for that purpose, and discontinue the same, at such times, and on such terms, as the court or judge may direct.

§ 233. If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects, as are provided by law upon attachments against absent debtors.

§ 234. The rights or shares which such defendant may have in the stock of any association, or corporation, together with the interest and profits thereon, and all other property, in this State, of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.

§ 235. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment, with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

§ 236. Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual, shall furnish him with a certificate, under his hand, designating the number of rights or shares of the defendant in the stock of such association, or corporation, with any dividend, or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If such officer, debtor, or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such orders may be enforced by attachment.

The statutory provisions, under the law in cases of attachment against absent debtors, will be found as above, at 2 R. S. 1 to 16, inclusive. See also the works on the old practice, in relation to the proceedings under these provisions, which are essentially the same as those under the Revised Statutes, with this exception, that the machinery of trustees, as thereby provided, is now swept away, and the sheriff alone acts in the matter.

Where legal proceedings may be necessary, under the provisions of sec. 232, the same may be prosecuted by the plaintiff himself, if thought advisable, under the following power, conferred by sec. 238:

§ 238. The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him, to the sheriff, of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify, by making affidavit, that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

The sheriff, having thus seized upon all the available property of the defendant, holds it in deposit, to abide the event of the suit, the plaintiff's lien taking precedence of any subsequent process lodged with him.

If the sheriff, knowing that the defendant has sufficient property to satisfy the debt, at the time the attachment is placed in his hands, neglect to make a sufficient levy for that purpose, he

will be liable in an action for the deficiency. *Ransom v. Halcott*, 9 How. 119.

An equitable interest, vested in defendants, was liable to be seized under an attachment, under the act of 1842, and doubtless is so under the Code; nor need a mere trustee for the parties to whom such equitable interest belongs, be served with a copy of the attachment, as required by the former measure. *Wright v. Douglas*, Court of Appeals, 12th April, 1853, reversing the judgment of the Supreme Court to the contrary effect.

In *Frost v. Willard*, 9 Barb. 440, an attachment, issued against goods in the hands of third parties, who had a claim to property in part thereof, and a lien on the remainder for advances, was held to have been bad as against those parties, and that they were entitled to recover, to the full extent of their lien.

In *Learned v. Vandenburg*, 7 How. 379, the question as to the lien of attachments is fully considered, and it was held, that, as under an execution, a seizure of personal property, to be valid, must be accompanied by possession; but the mere return of the sheriff is enough to secure the lien on the land, though the filing of a notice of *Lis Pendens* was considered as necessary, to make that lien available against *bona fide* purchases and incumbrances. It is likewise held that, on the question, whether or not property had been attached, the sheriff's return is conclusive; and also that, when several attachments had been served on the same property, the priority of their respective liens must be determined by the order in which they were delivered to the sheriff. This decision was affirmed by the General Term on appeal. See *Learned v. Vandenburg*, 8 How. 77.

An attachment against goods owned by absent debtors, and shipped, as directed, by them, but for which a bill of lading had not yet been given to the shippers, was held to be bad, on the ground that the right of possession had not yet passed from the shipper to the debtor in question. *Jones v. Bradner*, 10 Barb. 193.

The lien of a justice's attachment, in a constable's hands, was decided to hold good against surplus moneys on the sale of property, under a prior execution; and that such surplus moneys might be levied on, under a subsequent execution, under judgment in that suit. *Wheeler v. Smith*, 11 Barb. 345.

An attachment against a non-resident partner, only holds

good as regards his separate interest. Partnership property cannot be seized under it, and, if seized, will be ordered to be restored. *Sears v. Gearn*, 7 How. 383; *Stoutenburgh v. Vandenburg*, 7 How. 229; *Oakley v. Aspinwall*, 4 Comst. 513; 10 L. O. 79; 1 Duer, 1; and *Travis v. Tobias*, 7 How. 90, above cited or referred to.

### § 102. *Discharge of Attachment on giving Security.*

It is, however, competent for the defendant, at any period during the pendency of the action, to appear and apply for a discharge of the attachment, on giving security to the plaintiff. The provisions of the Code, in this respect, are contained in sections 240 and 241, which run as follows:

§ 240. Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and, if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant, or his agent, and released from the attachment.

§ 241. Upon such an application, the defendant shall deliver to the court or officer an undertaking, executed by at least two sureties, resident and freeholders in this State, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be, at least, double the amount claimed by plaintiff in his complaint.

The application for this purpose must be made on the usual notice, and a copy of the undertaking should be served with the notice or order to show cause.

Where, however, the attachment has been obtained upon a false statement, it seems the court will not require the security here prescribed, on moving to discharge it. *Killian v. Washington*, 2 C. R. 78. The attachment had there been obtained on the ground of non-residence, and the defendant applied to discharge it, on the ground that he was, in fact, a resident, under which circumstances, the court ordered a reference, under subdivision 3 of section 271, to ascertain the fact, without requiring any undertaking to be given.

By giving security as above prescribed, the defendant will necessarily waive any power he might otherwise possess, of moving to set aside the plaintiff's proceedings, on the ground of irregularity. See observations below on that subject, and the cases of *Haggart v. Morgan*, and *Cole v. Kerr*, there cited. This point should, therefore, be looked to, and the moving papers carefully inspected, with that view, before any decided step is taken.

*On Motion for Irregularity.*—Though not specially provided for by the Code, a motion on this ground is clearly maintainable, though considerable discussion has arisen as to the form of the motion, and the nature of the evidence, which will be admitted in support or opposition to it.

In *Conklin v. Dutcher*, 5 How. 386, 1 C. R. (N. S.) 49, it was held by the General Term of the Sixth District, that additional affidavits cannot be read on either side, on a motion to set aside an attachment. It cannot be set aside at special term, except for irregularity *ab initio*. The defendant has only "two modes of getting rid of it, where it has been improvidently granted: 1. By applying to the judge to vacate his own order, sec. 324. 2. By appeal to the General Term, under sec. 349, subdivision 1. But, in neither mode, can opposing affidavits be used by the defendant, nor can additional affidavits be used by the plaintiff. In this case, the defendant has pursued neither of these modes, and is without remedy."

"The Code, in allowing the process," says the learned judge in a previous part of his decision, "evidently intended it in the nature of bail, and the defendant can, at any time before final judgment, get the property discharged, by giving an undertaking for the payment of any judgment which may be recovered; sec. 240, 241. The entire omission of any other mode of discharging the attachment, is quite conclusive that the legislature did not intend that conflicting affidavits should be received for that purpose, especially as the legislature carefully provide for the reception of such affidavits, in two of the provisional remedies in this same Code;" and secs. 204 and 205, relative to arrest, and 225 and 226, to injunction, are then cited.

The views above taken are supported by *Harris, J.*, in *White v. Featherstonhaugh*, 7 How. 357, and likewise in *Bank of Lan-  
singburgh v. McKie*, 7 How. 360; and it was held that additional

affidavits could not be used on a motion to vacate, on the ground that the issuing of an attachment falls within the definition of an order, and, as such, is not reviewable on the merits, by another judge, but only by appeal, or by application to the judge who issued it to vacate his own order.

This view seems, however, to be too restricted, especially as regards the review by appeal; the point as to whether an attachment, considered as an order, could be reviewed at all on the merits, on appeal, seeming to be altogether lost sight of. The issuing of an attachment is a matter entirely resting in the discretion of the court, and, as such, is scarcely a proper subject of an appeal, except in cases of palpable error. The carrying out the above doctrine, to the extent laid down in the foregoing cases, would, in fact, involve a denial to a defendant of all power to contradict a *prima facie* case, made out by a plaintiff, however clear the oppression on him might be, on the whole of the facts, when brought out. In the first district, the contrary proposition is strenuously supported. The first of the cases on this side of the question is *Morgan v. Avery*, 7 Barb. 656; 2 C. R. 91; affirmed on appeal, 2 C. R. 121; and therefore standing, as authority, on equal rank with *Conklin v. Dutcher*. The power of the special term to entertain a motion testing the propriety of issuing an attachment, is distinctly asserted; and it is as distinctly held that, on such an application, the plaintiff will be allowed to introduce additional affidavits, and that, not merely in answer to those of the defendant, but also in support of the original attachment; this view being grounded on the fact, that attachment is in the nature of process, and is, as such, controllable by the court in all respects.

In *Camman v. Tompkins*, and *Gilbert v. Tompkins*, 1 C. R. (N. S.) 12 and 16, the same conclusion is maintained, and it was distinctly held that, where the defendant moves to discharge the attachment on affidavits, counter affidavits may be used by the plaintiff to support his case. "It is only when such a motion is made on the original affidavits alone, that the plaintiff is precluded from strengthening his case by amendments or additions." These cases, and the principles laid down, are also affirmed by the general term of the same district, in *Genin v. Tompkins*, 12 Barb. 265.

In *St. Amant v. Beixcedon*, 3 Sandf. 703, 1 C. R. (N. S.) 104, the general term of the Superior Court fully confirmed the

authority of *Morgan v. Avery* on these points, and stated, that "they entertain no doubt as to the right to introduce supplemental affidavits. The cases under the Code are different from those which have arisen under the Revised Statutes, where the jurisdiction of the court depended upon the facts set out upon the affidavits upon which the warrant was granted." The weight of authority tends therefore decidedly in favor of this conclusion.

The principle here laid down does not extend, however, to a case in which, on the original affidavits, the attachment was void for want of jurisdiction. Under these circumstances, the plaintiff cannot be allowed to introduce evidence in reply to the defendant's affidavits, on a motion to vacate, in order to make out a new case, showing that sufficient grounds existed at the time of the issuing, but which did not appear on the original papers. *Granger v. Schwartz*, 11 L. O. 346.

As regards the defendant's power to move, on affidavits disproving the plaintiff's original statement, the same case is another decided authority in favor of the views last considered. *Killian v. Washington*, 2 C. R. 78, before noticed, is also a decision to the same effect. In that case, and also in *Granger v. Schwartz*, evidence of residence was admitted, in order to vacate an attachment issued on the ground of non-residence.

Various cases, in which attachments have been vacated on different special grounds, will be found cited in the previous portions of the present chapter, as *Travis v. Tobias*, *Stoutenburgh v. Vandenburg*, *Sears v. Gearn*, and *Oakley v. Aspinwall*, in relation to resident joint debtors; *The Western Bank v. The City Bank of Columbus*, and *Eggleston v. Orange and Alexandria Railroad Company*, as to non-resident corporations; *Granger v. Schwartz*, *Fisher v. Curtis*, *Perry v. Montgomery*, *Cole v. Kerr*, and *Payne v. Young*, as to attachments in courts of limited jurisdiction; *Castellanos v. Jones*, *Staples v. Fairchild*, *Payne v. Young*, and *Jones v. Bradner*, as to attachments, void for insufficiency of original allegations.

An attachment cannot be impeached in a collateral proceeding. See *Burkhardt v. Sanford*, *Mills v. Corbett*, *Thompson v. Dickerson*, *In Re Griswold*, and *Morgan v. Avery*, above noticed.

A fatal objection to the original issuing of an attachment will not be cured by an appearance on the part of the defendant. It will still be competent for him to appear, and move to vacate on



a proper case shown. See *Granger v. Schwartz*, 11 L. O. 346, above cited. As regards general jurisdiction in the suit, however, an appearance, as after noticed under that head, will be a complete waiver. See *Watson v. Cabot Bank*, 5 Sandf. 423, and other cases there cited.

The giving of security, as provided by secs. 240 and 241, above cited, will, on the contrary, be a complete bar to any subsequent motion on the ground of irregularity. See *Haggart v. Morgan*, 4 Sandf. 198, 1 Seld. 422; *Cole v. Kerr*, 2 Sandf. 661. See, also, various cases to the same effect cited on the analogous subject of Arrest and Bail, in the first chapter of the present book.

*Result of Application.*—In case such an application be made and granted, the defendant becomes, of course, entitled to the return of the property, on the order discharging the attachment being entered, and served upon the sheriff in the usual manner. If the application fail, or if none be made, the case then comes on for trial in the usual course.

### § 103. *Effect of Judgment, if in favor of Defendant.*

If the plaintiff fail in the action, and the defendant recover judgment against him, the course to be pursued by the latter is thus pointed out by sec. 239 :

§ 239. If the foreign corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or his agent on request, and the warrant shall be discharged, and the property released therefrom.

The defendant may, too, under these circumstances, be entitled to prosecute a claim for damages against the plaintiff, and his sureties, under the undertaking prescribed in sec. 230, by action on such undertaking in the usual manner.

*If in favor of Plaintiff.*—If, on the contrary, judgment be recovered by the plaintiff, the sheriff's course thereupon is thus prescribed by sec. 237 :

§ 237. In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose.

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporate association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall re-possess himself of the same, and, for that purpose, shall have all the authority which he had to seize the same under the attachment; and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes, and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

When the judgment and all costs of the proceeding shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant, the residue of the attached property or the proceeds thereof.

For the purpose of authorizing the sheriff to proceed as above, an execution should be lodged in his hands in the usual manner.

It was considered in *Keyser v. Waterbury*, 3 C. R. 233, that, as soon as an execution is so lodged, the attachment is virtually at an end; but this seems clearly inconsistent with the special directions in sec. 237.

In *Hanson v. Tripler*, 3 Sandf. 733, 1 C. R. (N. S.) 154, it was held that an attachment, and supplementary proceedings on execution, might be carried on at the same time, in the same

case, subject to the questions as to the relative rights of the parties, being settled in an action by a receiver under those proceedings, in the event of a conflict arising.

*Question as to Rights of other Creditors.*—In *Fraser v. Greenhill*, 3 C. R. 172, the powers of the court on the above subject are stretched to their utmost limit, it being held that, where an attachment has been issued, any other creditor of the same party may come in, and seek to be made co-defendant in the suit. "A complete determination of the controversy, with respect to the fund which is in court by virtue of the attachment, cannot," said the learned judge, "be had without the presence of the subsequent creditors, and those creditors claim and have an interest in the whole controversy, involved in the suit brought by the prior creditors," on which grounds he granted the order, under sec. 122.

This decision really seems to amount to a practical repeal of the peculiar provisions of the Code, under which this proceeding is one for the exclusive benefit of the attaching creditor; and to a complete practical restoration of the machinery of the proceeding under the Revised Statutes, which was one for the benefit of creditors in general.

The law, as thus laid down, seems also open to most serious objection, on the following grounds:

The claims of subsequent creditors, are totally beside the controversy between the parties before the court. Any question on that subject is purely incidental, and has nothing to do with the rights, either of the plaintiff, or the defendant, as between themselves. That controversy can be determined without bringing other parties in, and surely it seems a great hardship on a plaintiff to encumber his suit with unnecessary parties, either seeking to raise collateral issues, manifestly prejudicial to the rights he has obtained, by his superior diligence; or fighting about a surplus, to which no one can have any claim whatever, until he have been first paid his debt and costs in full. To leave the subsequent creditors to their remedy as against the sheriff, and to the independent assertion of their rights as between each other, seems far more consonant to sound principles and sound practice; and a proceeding in the nature of interpleader, would afford at once, indemnity to the sheriff, and satisfaction to the parties, without encumbering the case of

the original suitor with controversies with which he has no concern, and difficulties, from which his superior diligence ought properly to have afforded him protection, and was evidently meant to do so by the legislature. See general principles, as to a plaintiff's right to proceed, without impediment by reason of discussions between co-defendants, as laid down in *Woodworth v. Bellows*, 4 How. 24, 1 C. R. 129.

The above views are confirmed by the case of *Judd v. Young*, 7 How. 79, where it was held that, in an action on contract, express or implied, for the recovery of money, a person interested, cannot claim to be brought in as a party; and such claim was there refused, on behalf of parties claiming an interest in a surplus in the hands of the defendant. Sec. 122 must, it was there held, be confined to actions for the recovery of real or of specific personal property.

The recent case of *In Re Coates*, 13 Barb. 452, is important, with reference to the rights of non-resident creditors to share in the proceeds of an attachment issued under the Revised Statutes, and the adjustment of the dividend under these circumstances, though, as belonging to the old practice, it does not properly come within the scope of the present chapter.

*Sheriff's Return, and Fees.*]—The return to be made by the sheriff, and the fees to which he is entitled, are thus provided for by sections 242 and 243:

§ 242. When the warrant shall be fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court in which the action was brought.

§ 243. The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed by law for like services and disbursements, under the provisions of chapter five, title one, part two, of the Revised Statutes.

## CHAPTER V.

APPOINTMENT OF RECEIVER, AND OTHER PROVISIONAL  
REMEDIES.§ 104. *Statutory Provisions.*

IN the Codes of 1848 and 1849, the subject of minor provisional remedies was left unprovided for, except by a general reservation of the existing powers of the court. On the amendment of 1851, however, these matters, and the subject of receiverships in particular, were made matter of special provision by sec. 244, and that section has since been further altered on the recent revision, and now reads as follows:

§ 244. A receiver may be appointed:

1. Before judgment, on the application of either party, when he establishes an apparent right to property, which is the subject of the action, and which is in the possession of an adverse party; and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property, according to the judgment, or to preserve it during the pendency of an appeal; or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act.

When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed; the court, besides punishing the disobedience as for contempt, may make an order, requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the court.

When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim; and may enforce the order, as it enforces a provisional remedy.

### § 105. *Receivers.*

The practice in respect to the appointment and duties of receivers is, as will be seen, rather defined than altered by these provisions, and remains substantially the same as before. The elementary and other works upon that subject, and in particular, the treatise of Mr. Edwards, should, accordingly, be carefully consulted; and the following observations will be confined simply to a short citation and consideration of the decisions which have taken place under the Code, in relation to this remedy, in the order pointed out by the section itself, as now amended.

The first subdivision of that section is, in fact, the principal point to be looked into, in the present connection, bearing, as it does, more peculiarly the stamp of a provisional remedy. Subdivisions 2 and 3, are, on the contrary, more properly provisions consequent on a judgment or decree, and, as such, will be hereafter considered.

An application for a receiver, in general, unless forming part of the judgment in the cause, must, in all cases, be grounded on the usual notice to the adverse party; (see *Kemp v. Harding*, 4 How. 178, and *Dorr v. Noron*, 5 How. 29,) and must be brought on as a motion, on affidavits in the usual manner. A form of notice of motion will be found in the Appendix. The affidavits on which it is grounded, must state the facts of the case, and must clearly bring it within the terms of the section as above cited. A *prima facie* right to the property claimed, and a reasonable apprehension of its being lost or injured, must, in all cases, be fully established, or the application will not be granted. See *Goodyear v. Betts*, 7 How. 187, *Austin v. Chapman*, 11 L. O. 103. The motion may, as has been seen, be

made at any time before judgment, and by either party; but, of course, it cannot be made until after the action has been duly commenced by service of process. If immediate injury be apprehended, an injunction may be applied for collaterally, and on the same papers; and, if the risk be imminent, the application may be shaped in the form of an order to show cause, with an interim injunction, until it is brought on and disposed of in due course.

Security must be given by the receiver when appointed, as under the former practice.

Where the application for a receiver forms part of the relief originally contemplated at the outset of the suit, it should be formally prayed for in the complaint, and the subsequent application must be grounded upon that prayer. Where, however, two parties have an equal interest in the same fund, and an injunction has been granted on the application of one, a motion for an injunction and receiver, will be so on the part of the other, almost as of course, although a prayer to that effect may have been omitted in the complaint. *McCracken v. Ware*, 3 Sandf. 688, 1 C. R. (N. S.) 215.

A *prima facie* case for the granting of this remedy being shown as above, the merits of the action will not otherwise be inquired into; the proceeding being merely for the preservation of the property in controversy, and not for any adjudication as to the ultimate rights of the parties. *Sheldon v. Weeks*, 2 Barb. 532; 1 C. R. 87; *Conro v. Gray*, 4 How. 166. See, also, *Todd v. Crooke*, 1 C. R. (N. S.) 324, below cited.

A motion for a receiver will not be granted, to restrain the due use of joint property, where no abuse can reasonably be apprehended, and where full security has been given, for the due accounting for mesne profits. *Dunham v. Jarvis*, 8 Barb. 88.

Where, however, there is any doubt as to the safety of the fund, the application will be granted, almost as of course.

Where, too, a partnership had been dissolved in order to a new arrangement, the terms of which remained uncertain at the time of the institution of the suit, a receiver was granted. *Smith v. Dunvers*, 5 Sandf. 669.

In *Dillon v. Horn*, 5 How. 35, an injunction and receiver were granted, at the suit of a general creditor of insolvent general partners, on complaint and answer, the debt not being denied.

In the case of an expired special partnership, a receiver was appointed in the usual manner, in a suit for an account, in *Hogg v. Ellis*, 8 How. 473.

In *Hubbard v. Guild*, 1 Duer, 662, it was held, that though a solvent partner is not entitled, as of right, to the administration of the partnership assets, on a dissolution in consequence of the separate insolvency of others; a preference will be given to him as receiver, when his capacity and integrity are unquestioned.

In *Cary v. Williams*, 1 Duer, 667, it was held, that a suit for an injunction and receiver was the proper course to pursue, where one partner sought redress for the fraudulent removal of goods by another; and that an ordinary action, with a view to the arrest of the latter, could not be maintained.

In a suit against trustees, to set aside an assignment on the ground of fraud, a receiver was appointed, though the defendant denied the fraud, the facts which warranted such an inference not being controverted. *Churchill v. Bennett*, 8 How. 309. So, where the defence was a doubtful one, a similar appointment was made. *Quick v. Grant*, 10 L. O. 344.

A receiver will not, however, be appointed in a case where the plaintiff's title to relief is disputed, and no danger shown. *Austin v. Chapman*, 11 L. O. 103. See, also, *Goodyear v. Betts*, 7 How. 187.

The granting of receiverships, under subdivisions 2 and 3, will be hereafter fully considered under the heads of Judgment, and Proceedings supplementary to Execution, and particularly the latter. See that chapter, and the cases of *Kemp v. Harding*, 4 How. 178; *Corning v. Tooker*, 5 How. 16; *Dorr v. Noxon*, 5 How. 29; *Porter v. Williams*, 5 How. 441, 9 L. O. 307; 1 C. R. (N. S.) 114; Court of Appeals, 31st Dec., 1853; *The People v. Hulburt*, 5 How. 446; *McCracken v. Ware*, 3 Sandf. 688, 1 C. R. (N. S.) 215; *Todd v. Crooke*, 1 C. R. (N. S.) 324; *Gouverneur v. Warner*, 2 Sandf. 624; *The People v. King*, 9 How. 97; *Van Rensselaer v. Emery*, 9 How. 135; *Vanderpool v. Van Valkenburgh*, 2 Seld. 190; *The Chautauque County Bank v. White*, 2 Seld. 236, and other decisions there cited.

The statute law on the subject of receiverships of the property of insolvent or dissolved corporations, will be found in articles II. and III. of title IV., chap. VII., part III. of the Revised Statutes, 2 R. S. 466 to 472. See, also, chap. II., title



XIII. of the Code, part II., and in particular, sec. 444 of that chapter.

In *Conro v. Gray*, 4 How. 166, a long discussion will be found, as to the circumstances under which a receiver will be appointed in these cases, and various cases under the old practice are cited. The receiver of an insolvent Mutual Insurance Company is entitled to charge commission on the value of deposit or premium notes, come to his hands, and surrendered to the makers under order of the court. *Van Buren v. Chenango County Mutual Insurance Company*, 12 Barb. 671. The duties of such a receiver are fully discussed in *Bangs v. Gray*, 15 Barb. 264.

A receiver of such a corporation cannot impeach or disaffirm its lawful or authorized acts. "For most, if not all purposes, he takes the place, and stands as the representative of the company. He is as much bound by a settlement which the company were authorized to make, as the company itself." *Hyde v. Lynde*, 4 Comst. 387. He cannot impeach or disaffirm the lawful and authorized acts of the corporation, or of its president, acting within the limits of his authority. *Brouer v. Harbeck*, 1 Duer, 114.

The works as to the former practice, may be consulted as to the different cases saved by subdivision 5.

The duties of receivers in general remain as under the late practice; those of receivers under proceedings supplementary to execution, are prescribed by Rule 77 of the Supreme Court, and will be hereafter considered.

In *Porter v. Williams*, 5 How. 441, 9 L. O. 307, 1 C. R. (N. S.) 144, affirmed by Court of Appeals, 31st Dec., 1853, although the case is one of receivership in proceedings supplementary to execution, the doctrine is laid down, in general terms, that, when a receiver has been duly appointed, he becomes, by virtue of his office, legally entitled to the possession of the debtor's estate, and that, though usual, no assignment was necessary to divest the latter's title to personal property, and to vest that property in him. He also becomes thereupon entitled to the rents and income of the debtor's real estate, but the title to such estate itself can only be divested by sale on execution. The same doctrine is also laid down in *The People ex rel. Williams v. Hulburt*, 5 How. 446.

In *Rutter v. Tullis*, 5 Sandf. 610, it was further held, that the

title of a receiver exists, by relation, from the date of the order directing his appointment, in the same manner as if that order, instead of directing a reference, had named the receiver.

Where, too, a judgment debtor was in contempt for not making an assignment of his property, as ordered, it was held that an order for the sequestration of his property was no longer necessary under the Code; that the receiver's title became perfect, when he had given the requisite security, and then operated, by relation to the time when the order was made; and that such order was *per se* a sequestration, and gave the receiver all necessary means of enforcing his rights. *West v. Fraser*, 5 Sandf. 653.

In the case *In Re Paddock*, 6 How. 215, it was held that, although the court may remove trustees or receivers for insolvency, it is not absolutely bound to do so; and, in that case, an application for such purpose was refused, the fund not appearing to be in danger, and the insolvency of the receiver having been known to the parties, before his appointment.

In *Bennett v. Chapin*, 3 Sandf. 673, the following principles are laid down, in reference to the duties and powers of a receiver, when appointed:

1. He cannot make rests in his accounts, with a view to his commission, which must be calculated on the aggregate of his receipts and payments.

2. In cases where the fund is for the joint benefit of parties, without the existence of adverse interests between them, he may employ the counsel of one of such parties; but not, if the reverse be the case.

3. He is entitled to charge commission on choses in action actually in his hands, and delivered over by him to the parties, before realization, on a final settlement of his accounts. See also as to assets, delivered up by order of the court, on winding up the affairs of an insolvent company, *Van Buren v. Chenango County Mutual Insurance Company*, 12 Barb. 671, above cited.

In relation to the sale of real property by a receiver in a creditors' suit, see *The Chautauque County Bank v. White*, 2 Seld. 236. A person, standing in this position cannot purchase and hold property, comprised in his receivership, to his own use; a purchase by him, if made, will enure to the benefit of those for whom he acts, at their election. *Jewett v. Miller*, Court of Appeals, 30th Dec., 1852.

Before bringing or defending an action on behalf of the estate, a receiver must apply to and obtain the consent of the court; and, if he fail to do so, he will be personally liable for the costs. *Phelps v. Cole*, 3 C. R. 157.

In *Gouverneur v. Warner*, 2 Sandf. 624, it was decided that a plaintiff in a creditor's suit, who had obtained a receiver over the defendant's property, could not afterwards levy an alias execution, on personal property covered by such receivership.

### § 106. *Other Remedies.*

By this section, as it stood in the Code of 1851, all other provisional remedies then existent, were saved. In relation to those remedies, see the works on the old practice. The questions as to the writ of *ne exeat* have been already considered under the head of Arrest. The writ of *supplicavit*, it seems, had not ceased to exist as a provisional remedy, under the Code of 1849. *Forrest v. Forrest*, 5 How. 125; 10 Barb. 46. See, likewise, as to the writ of *ne exeat*, *Bushnell v. Bushnell*, 7 How. 389, before cited.

How far the total omission of this reservation, from the section as recently amended, may affect the question as to the future existence of the remedies last alluded to; and what may be the exact import of this provision henceforth, remains to be settled by judicial construction. See this subject heretofore alluded to.

The remedies provided by the latter part of the section, in relation to funds or property admitted by a defendant to be in his possession, and for the making and enforcement of an order for their deposit or delivery; and likewise those, by which the satisfaction of an admitted portion of a partially disputed claim may be enforced, will hereafter be considered, and the cases cited, under the head of Proceedings on the part of the Plaintiff after Answer, to which reference should be made accordingly.

## BOOK VI.

### OF PLEADING, GENERALLY CONSIDERED.

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#### CHAPTER I.

##### OF THE ESSENTIAL REQUISITES OF PLEADING.

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#### § 107. *Abolition of ancient Forms.*

OF all the radical and searching changes effected by the Code, perhaps the most so, is that in the matter of pleading, the whole fabric of which, in actions of strictly common law cognizance, has been swept away *in toto*, and supplanted by a new system, borrowing its nomenclature, and, in some degree, its general forms, from the former equity practice; but yet, in many respects, independent of the rules by which that practice was governed.

The preamble of the Code lays down this intention on the part of the Legislature, in the widest terms, as follows :

“Whereas it is expedient, that the present forms of actions and pleadings in cases at common law should be abolished ; that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established.”

The immediate controlling agent, by which this change is effected, is section 69, running as follows :

§ 69. The distinction between actions at law and suits in equity and the forms of all such actions and suits, heretofore existing, are abolished ; and there shall be in this State, hereafter, but one form of action, for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

By section 140, also, the following provision is made, the phraseology being rendered still stronger and more definite, on the recent amendments:

§ 140. All the forms of pleading heretofore existing, are abolished; and, hereafter, the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings are to be determined, are those prescribed by this act.

Although the adoption of a general and uniform system of pleading, in all cases, is a most desirable object, and is, above all others, the grand alteration which it is the express design of the Code to effect; and although the formal distinctions between Common Law and Equity pleadings be, as unquestionably they are, abolished by that alteration; still, such is not, and cannot be the case, with reference to the essential and inherent distinctions between Law and Equity themselves, as two separate, though connected sciences.

As long as the common law, with all its attendant doctrines, remains an existent agent, so long must the essentials of the two systems, as hitherto administered, remain indestructible. The object of the legislature, doubtless, was to blend them into one harmonious and connected whole, as far as practicable, both as to matters of form and matters of substance, and much has been done in this respect; but, to effect it wholly, was, and, as regards the latter especially, must ever remain; beyond the reach of their powers.

### § 108. *Distinctions between Law and Equity.*

*How far abolished.*—In a broad and general view, the former distinctions between proceedings at law and proceedings in equity, are doubtless at an end, according to the intention of the legislature, as expressed in the preamble of the Code, above cited.

In *Giles v. Lyon*, 4 Comst. 600, 1 C. R. (N. S.) 257, the necessity of keeping that preamble in view, by those who are called upon to interpret its provisions, is strongly enforced; and the effect of the provisions above cited, is thus defined: "They," *i. e.*, Law and Equity, "were to be blended and formed into a single system, which should combine the principles peculiar to

each, and be administered thereafter through the same forms, and under the same appellation."

In *Grant v. Quick*, 5 Sandf. 612, it is held that the distinction between the legal and equitable jurisdiction of all the courts of the State, except in reference to the nature of the relief demanded, is now abolished, and it was accordingly held that the power of one court to restrain an action in another, has ceased to exist.

So, too, in *Gardiner v. Oliver Lee's Bank*, 11 Barb. 558, it is laid down, at p. 568, that courts of law and equity are now blended together, and held by the same judges. It is decided, however, in the same case, that no new rights of action have been conferred thereby, and that an action which, under the old system, would not have been cognizable by either of the separate tribunals, cannot be maintained under the new. See, also, *Bouton v. The City of Brooklyn*, 7 How. 198. See affirmance of last decision, 15 Barb. 375.

Similar principles are laid down in *Hinman v. Judson*, 13 Barb. 629, on the subject of equitable defences; also, with great force, in the opinion of *Parker, J.*, (p. 422,) in *Marquat v. Marquat*, 7 How. 417, in which he insists most strongly on the expediency of the judiciary coöperating with the legislature, in carrying out the reforms which have been effected: and likewise in *Hunt v. The Farmers' Loan and Trust Company*, 8 How. 416, and *Crury v. Goodman*, 9 Barb. 657; see, also, *Fay v. Grimstead*, 10 Barb. 321; *Getty v. The Hudson River Railroad Company*, 6 How. 269, 10 L. O. 85: and numerous other cases of earlier date might be cited, were it necessary, to maintain the same position.

The abolition in question is then clearly effected, in a broad and general point of view, in so far that all distinction between the courts in which the plaintiff is at liberty to seek the remedy the law provides in each particular case, is abolished. An action, whether legal or equitable in its nature, is commenced by the same form of process; the names, offices, and general scope of the pleadings in that action (apart from matters of detail) are the same in both cases. The remedies heretofore obtainable by separate suits in different courts, may now, as a general rule, be combined in the same action; the proceedings in that action, when commenced, are cognizable by the same judge; and that judge, in cases of a mixed nature, is bound,

whenever possible, to adapt the relief granted by him to the principles heretofore administered by two distinct and separate jurisdictions, without giving an undue preference to either.

*How far Existent.*]—At this point, the intended, and indeed expressed amalgamation of the two systems on the part of the legislature, has of necessity reached its limits, and the essential distinctions between law and equity, and legal and equitable relief, remain undestroyed and indestructible. Distinct and positive assertions of that indestructibility appear, it may be safely said, in every case, in which the matter has been brought seriously under the consideration of the courts throughout the State.

In *Shaw v. Jayne*, 4 How. 119, 2 C. R. 69, the earliest case upon the subject after the passage of the Code, the position above taken is maintained in the clearest and most positive terms.

In *Knowles v. Gee*, 4 How. 317; *Hill v. McCarthy*, 3 C. R. 49; *Merrifield v. Cooley*, 4 How. 272; and *Floyd v. Dearborn*, 2 C. R. 17, it also appears unequivocally. That, although the distinctive forms of action be abolished, the principles which always have governed them still subsist in all their force, is maintained in *Hinds v. Myers*, 4 How. 356, 3 C. R. 48; and *McMaster v. Booth*, 4 How. 427, 3 C. R. 111. In no case does the general principle come out with greater clearness, than in *Linden v. Hepburn*, 3 Sandf. 668, 5 How. 188, 3 C. R. 165, 9 L. O. 80; and that clearness is, if possible, still augmented in *Burget v. Bissell*, 5 How. 192, 3 C. R. 215; *The Rochester City Bank v. Suydam*, 5 How. 216; *Milliken v. Carey*, 5 How. 272, 3 C. R. 250, (a case in which a restricted view of the question is taken in other respects;) *Carpenter v. West*, 5 How. 53; *Howard v. Tiffany*, 3 Sandf. 695, 1 C. R. (N. S.) 99; and *Benedict v. Seymour*, 6 How. 298. The same may be said as regards *Fraser v. Phelps*, 4 Sandf. 682, where it is laid down as follows: "As we have frequently had occasion to say, the Code has not abolished the essential distinctions between suits at law and in equity, nor ought it to be construed as limiting or abridging the powers which, in cases like the present, Courts of Equity have been accustomed to exercise." See, also, *Crary v. Goodman*, 9 Barb. 657; *Dauchy v. Bennett*, 7 How. 375; *Le Roy v. Marshall*, 8 How. 373; *Cook v. Litchfield*, 5 Sandf. 330, 10 L. O. 330, affirmed by Court of Appeals, 31st December, 1853; *The Merchants' Mutual Insurance*

*Company of Buffalo v. Eaton*, 11 L. O. 140; *Bouton v. The City of Brooklyn*, 7 How. 198; same case, 15 Barb. 375; *Spencer v. Wheelock*, 11 L. O. 329; *Dobson v. Pearce*, 1 Duer, 142, 10 L. O. 170; not to mention numberless other decisions, in which the same rule has been acted upon in spirit, though not asserted in terms, and which will be found in almost every page of the different reports.

### § 109. *Averments of Fact, Principles as to.*

*General Remarks.*]—Universal, however, as has been the assent of the judicial body to the general principle as above laid down, very great differences have prevailed amongst them, as to the minor shades of distinction in relation to its reduction into practice; the mention of which differences introduces, as its necessary consequence, the consideration, in a general point of view, of averments of facts in pleading.

The peculiar incidents to each of the different proceedings of complaint, demurrer or answer, and reply, the only modes of pleading now allowable under the Code, will be considered hereafter; but there are, nevertheless, certain broad and general principles, common to these forms indiscriminately, and which will be now dealt with.

The observations about to be made, are, of course, inapplicable to the proceeding of demurrer, nor will the question of merely responsive allegations be here treated; the following remarks will, on the contrary, be strictly confined to the general principles of pleading, which govern averments of the facts necessary to be put in issue, either in support, or in opposition to a claim, and to such averments only.

The general principles of the Code, in relation to averments of this nature, whether in complaint, answer, or reply, are, in reality, identical. The complaint must contain "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." (Sec. 142, sub. 2.) The answer, "a statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition." (Sec. 149, sub. 2.) And the reply "may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defence to new matter in the answer," by which a counter-claim is pleaded. Sec. 153.



The omission, in the present measure, of the additional requisites imposed by the Codes of 1848 and 1849, that the averments above alluded to were to be made in "ordinary" language, and "in such a manner as to enable a person of common understanding to know what is intended," is significant. Excellent as was the meaning of that provision, to carry it out to its full extent was a matter of the utmost difficulty, if not wholly impracticable; first, because of the consequent necessity of fixing some definite gauge of what is or is not "common understanding;" and, secondly, because of the difficulty of stating a legal cause of action concisely, or even of stating it at all, without the employment of legal terms, involving the consequent, and perhaps still greater difficulty, of making the statement thus framed intelligible to a person of "common understanding," ignorant, perhaps, of the very meaning, and, certainly, of the full import of the terms so used.

To have given the extended interpretation to the words in question, of which, in strictness, they are capable, might have been the means of introducing a system of averment, so loose, and so illogical, as, in practice, to become almost intolerable; whilst a restricted construction of those words, such as has, in fact, almost universally prevailed, left the question just where the present amendments of the section have now placed it. By such a construction, a necessity of making his pleadings concise, intelligible, and explanatory of the matter really at issue, was practically imposed upon the pleader in all cases, and is now so imposed in terms.

The traditionary forms of the old special pleading system are therefore, as already stated, practically abolished. Under certain circumstances, however, and with certain modifications, the substantial wording of those forms may still be used, and used with advantage, especially in actions which, under the former practice, were of purely common law cognizance. Thus in *Shaw v. Jayne*, 4 How. 119; 2 C. R. 69, before cited, the mode of stating a cause of action for false imprisonment, as theretofore in use under the old practice, was held to be all that was necessary. In *Dollner v. Gibson*, 3 C. R. 153, 9 L. O. 77, a most decided preference is shown for the employment of the old-established form of a count for goods sold and delivered. In *Leopold v. Poppenheimer*, 1 C. R. 39, a complaint for breach of promise of marriage, following the old form of declaration, was declared sufficient, with some slight modifications; and, in *The Stockbridge*

*Iron Company v. Mellen*, 5 How. 439, it was considered that a complaint against a common carrier, using the first of the old common law counts, would be good, although all the other counts, the pleader having employed the whole of the old form, were to be stricken out as redundant. See also the same general principle laid down in *Howard v. Tiffany*, 3 Sandf. 695, 1 C. R. (N. S.) 99; and, likewise, in *Root v. Foster*, 9 How. 37, and *Dows v. Hotchkiss*, 10 L. O. 281. This principle has, however, only a very limited application, and is only properly applicable to those cases in which a sufficient statement of the facts on which the action is grounded, was in use under the old practice: in others, it cannot be safely applied. See *Blanchard v. Strait*, 8 How. 83; *Wood v. Anthony*, 9 How. 78; *Eno v. Woodworth*, 4 Comst. 249, 1 C. R. (N. S.) 262; *Sipperly v. Troy and Boston Railroad Company*, 9 How. 83.

On the other hand, in actions of an equitable nature, a decided preference ought to be given to the forms of equity pleading, so far as they are consistent with the Code. *Coit v. Coit*, 6 How. 53. Although the forms of common law pleading are expressly abolished by the preamble of that measure, those in equity are not, and it would seem that, so far as they are not inconsistent with the Code, they are not repealed. This principle must, however, be also kept within its due limits. It will, there is little doubt, hold good as far as regards the statement of facts on which the prayer for relief is grounded. Beyond this it cannot be carried. The former system of allegation by way of pretence and charge is altogether inadmissible, and, if adopted, will render the pleading objectionable for redundancy. The facts of the case are required, and nothing else. *Clark v. Harwood*, 8 How. 470. An answer, drawn in conformity with the old chancery rules, admitting the statements in the complaint, and stating various legal propositions and arguments in defence, was held to be bad in *Gould v. Williams*, 9 How. 51.

As a general rule, however, all previous forms must be considered as abolished, according to the express provision to that effect in section 69; and the question then arises, what is now the proper form of averments of fact for the future, both generally, and with reference to the particular form of relief to be sought under different states of circumstances.

There can be no doubt but that, to a certain extent, the same principles of averment will, for the future, govern the pleadings in all actions whatever, whether of common law or equitable

cognizance; and indeed such was, in many respects, the case, even under the former system, with reference to those general rules which lie at the root of all good pleading whatever, whether legal or equitable.

The principle as to what are or are not constitutive, as opposed to probative facts, is thus laid down in *Garvey v. Fowler*, 4 Sandf. 665, 10 L. O. 16: "The plaintiff must now state in his complaint all the facts which constitute the cause of action, and I am clearly of opinion that every fact is to be deemed constitutive, in the sense of the Code, upon which the right of action depends. Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred, and every such averment must be understood as meaning what it says, and, consequently, is only to be sustained by evidence which corresponds with its meaning."

The facts of the case must, in every form of action, be set forth with sufficient certainty, so as to give the court adequate data on which to ground a judgment, or demurrer will lie. *Tallman v. Green*, 3 Sandf. 437.

The following general views are laid down in *Mann v. Morewood*, 5 Sandf. 557: A complaint must set forth all the material and issuable facts, which are relied on as establishing the plaintiff's right of action, and not the inferences from those facts which, under the advice of his counsel, he may deem to be conclusions of law. The facts which are required to be stated as constituting the cause of action, can only mean real, traversable facts, as distinguished from propositions or conclusions of law, since it is the former, not the latter, that can alone, with any propriety, be said to constitute the cause of action.

In *Fay v. Grimstead*, 10 Barb. 321, the principles of pleading under the Code are thus stated: "It is one of the principal objects of the Code of procedure to abrogate the old forms of pleading, and to bring the parties to a plain, concise, and direct statement of the facts which constitute the cause of action, or the defence, in place of the general statement heretofore in use."

In *Bridge v. Payson*, 5 Sandf. 210, analogous views are held, with reference to the mode of stating defences. See likewise, *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573, in relation to what will, or will not be held to be new matter in defence, and necessary, as such, to be alleged in the answer.

In *Smith v. Lockwood*, 13 Barb. 209, 10 L. O. 232, 1 C. R. (N. S.) 319, in which a complaint, based on general averments alone, was held bad, it was said: "The court must see by the facts set forth in the complaint, that the plaintiffs have sustained, or are threatened with some legal injury. The objection is fatal to the complaint, as it now stands." See also other cases to the same purport, cited under the next head.

In *Clark v. Harwood*, 8 How. 470, in which the complaint contained a series of pretences and charges, according to the old equity system, the court said: "The plaintiff is to state the facts which constitute his cause of action, and nothing more." See also *Gould v. Williams*, 9 How. 51, holding that an answer must now either deny allegations found in the complaint, or state new matter by way of avoidance, and that the old chancery practice of stating legal propositions and arguments in defence is now inadmissible.

And, it would seem that allegations of facts, though grounded on information and belief, should be positively made in terms. *Truscott v. Dole*, 7 How. 221; *Milliken v. Carey*, 5 How. 272, 3 C. R. 250; *Dollner v. Gibson*, below cited. This principle, though applicable as a general rule, is, however, open to considerable modification. See *Radway v. Mather*, 5 Sandf. 654, where a statement of a portion of the facts constituting a cause of action, on belief only, was held to be sufficient, and a demurrer on that ground overruled as frivolous.

Where more than one cause of action or ground of defence is relied on, it is essential to their validity that they should be "separately stated," and the safe rule is to mark the separation, by fitting and appropriate divisions, by way of commencement and conclusion. See *Benedict v. Seymour*, 6 How. 298; *Lippincott v. Goodwin*, 8 How. 242; though it would seem, from *Bridge v. Payson*, 5 Sandf. 210, that this is not absolutely essential. It is, however, laid down in that decision, that each statement must be complete in itself; and it has been decided, in numerous cases, hereafter cited in Chap. IV. of this book, that the mixing up separate grounds of action or defence in one general statement, without proper distinctions, will render the pleading fatally objectionable. Rule 87, also inserted on the last revision, and which provides that "In all cases of more than one distinct cause of action, defence, counter-claim, or reply, the same shall not only be separately stated, but plainly numbered," adds force

to the views maintained in *Benedict v. Seymour*, and *Lippincott v. Goodwin*, although, in the former of the cases especially, these views appear to be somewhat over-rigidly laid down.

It would be difficult to find a clearer or more accurate definition of what pleadings ought to be under the Code, and this, in all cases, and without reference to the peculiar nature of the relief sought, than that laid down in *Boyce v. Brown*, 7 Barb. 80, 3 How. 391, in the following words: "The pleader may use his own language, but the necessary matter must be there, and be stated in an intelligible and issuable form, capable of trial. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments, nor inferences, nor matter of law only." "Nor should pleadings be hypothetical, nor alternative," and many cases under the old practice are cited. "Good pleading should be material, single, true, unambiguous, consistent, and certain to a common intent, as to time, place, person, and quantity, and not redundant or argumentative." Again, "As a general rule, a pleading, to be good by the settled principles of pleading as modified by the Code, must state the facts constituting a legal cause of action or ground of defence; and these should be set forth in a plain, direct, definite, certain, and traversable manner, and according to their legal effect."

To this extent, then, the pleadings in all actions, of whatsoever nature, must conform to the same general requisites; but, from this point, the question branches out into many ramifications, on which the different courts, and different branches of the same court, have held widely diverse opinions.

*Distinction between Legal and Equitable Averments.*]—The grand conflict of judicial construction, has been as to whether distinctions ought or ought not to be drawn, between the mode of averment of causes of action, or grounds of defence, of a strictly legal nature on the one hand, or of one strictly equitable on the other; or whether, on the contrary, the same, and that a rigid and inflexible system of averment, is essential in all, whether legal or equitable in their nature and origin; and not only this, but some cases have gone so far as to shadow out the doctrine, that a cause of action belonging to the one class, cannot be met by a line of defence, belonging to the other, though, on a careful comparison of the whole of the reported cases, it does not appear that this view was sound, even under the Codes of 1849 and

1851; see *Hill v. M'Carthy*, 3 C. R. 49; *Otis v. Sill*, 8 Barb. 102; *Crary v. Goodman*, 9 Barb. 657. The recent amendments in secs. 150 and 167, put the point now beyond question, that such joinder is admissible, wherever appropriate.

*Liberal View of the Subject—Averments may be adapted to Nature of Case.*—In *Shaw v. Jayne*, 4 How. 119, 2 C. R. 69, above cited, the more liberal view on this contested point was, for the first time, asserted, and it was held, "that the pleader should adapt the form of his statement to the class," *i. e.*, of legal or equitable actions "to which the case belongs." See, also, *Otis v. Sill*, 8 Barb. 102, above noticed. In *Knowles v. Gee*, 4 How. 317, it was admitted that "the legislature, by adopting the forms of chancery pleadings, had given unequivocal indication of a preference for those forms," and that, in consolidating two distinct systems of jurisprudence, "it became indispensable to borrow something from each." In *Linden v. Hepburn*, 2 Sandf. 668, 5 How. 188, 3 C. R. 165, 9 L. O. 80, the principle that the distinction between legal and equitable remedies still subsists, is laid down in the clearest terms. In *Burget v. Bissell*, 5 How. 192, 3 C. R. 215, the general rule above referred to, *i. e.*, that the mode of statement should be adapted to the relief claimed, is again clearly repeated, the distinction being again drawn between actions of legal and equitable cognizance; and the principle laid down, that, in cases where there was any doubt whether the action or defence was of an equitable nature, any averments adapted to the latter contingency ought to be allowed to stand; whilst, in *The Rochester Bank v. Suydam*, 5 How. 216, the same conclusions are enounced with the utmost clearness, and in the following terms:

"The kind of relief given by a Court of Equity, imperatively required a different mode of stating the case, from that adopted in the Common Law Courts.

"The decree in chancery, with all its varied provisions, its conditions and limitations, could not be engrafted upon the record of a common law action. The two were incompatible. From the one was carefully excluded every fact, not essential to enable the court to determine for which party to give judgment; the other required a consideration of all the circumstances, bearing upon the nature of the judgment, and going to modify or vary its provisions."

The learned judge then summed up his argument as follows:

"So long as jurisdiction in equity and law are kept distinct, and courts of justice are permitted to adapt the relief thus afforded to the facts and circumstances in one class of cases, while they are confined to a simple judgment for or against the plaintiff in all others, so long must different rules be applied to pleadings at law or in equity.

"To do this, is not inconsistent with the provisions of the Code, which does not attempt to abolish the distinction between law and equity, even if the legislature had the power to do so under the Constitution. See Const., Art. 6, secs. 3 and 5.

"My conclusion, therefore, is, that the statement of facts in a complaint should be in conformity with the nature of the action. If the case, and the relief sought, be of an equitable nature, then the rules of chancery pleading are to be applied; otherwise those of the common law."

The motion to strike out the averments there complained of, though embracing much circumstantial detail, and apparently many matters of mere evidence, was accordingly denied, "for the reason that the convenience of a Court of Equity is promoted, by having as many of the circumstances appear in the pleadings, and as few in the proofs, as possible, and for the other reasons already given."

In *Wooden v. Waffle*, 6 How. 145, 1 C. R. (N. S.) 392, the reasoning in the foregoing cases is reiterated by the same learned judge at great length, in consequence of the adverse opinions in *Milliken v. Carey*, and *Williams v. Hayes*, hereafter noticed. The distinction between the necessary allegations in common law and equity pleadings is thus drawn: "The allegations in a pleading at law, consist of a chain of facts, all tending to establish some definite legal right. An equity pleading, on the contrary, frequently, if not generally, consists of an accumulation of facts and circumstances, without logical dependency, but the accumulated weight of which is claimed to be sufficient to raise or defeat an equity. If a single link be destroyed in the former, the whole conclusion falls; but, if you abstract a fact from the latter, you have not of necessity broken the chain, but only diminished the weight of the whole." After drawing a similar distinction between what are really material issues, in legal and equitable actions, and defining the latter as "an issue upon a fact which has some bearing upon the equity, and ought to be established," but not a mere matter of evidence; and stating

as one of the reasons why chancery pleading was made more in detail, that its purpose was "to put the court in possession of all the facts, going to show, both the plaintiff's right to relief, and what that relief should be;" the learned judge proceeds to lay down, that this reason "is in no way affected by any provision of the Code. Equity jurisdiction is maintained. It is exercised upon the same principles, and to the same extent, as heretofore. The mode of trial is the same. The relief is adapted to the circumstances of the case. Every reason, therefore, which ever existed for a full statement of the case, exists now."

In *Howard v. Tiffany*, 3 Sandf. 695, 1 C. R. (N. S.) 99, it is also laid down that, where a portion of the relief sought is of an equitable nature, it will be often indispensable to set forth facts, which need not be stated in respect of the other relief, "and, as much at large as was formerly done in a well-drawn bill in chancery;" and also, that the "facts constituting a cause of action, include not merely the facts upon which the plaintiff's right to relief is founded," but also "all such facts as are necessary to found the particular relief demanded, and to enable the court to give the proper judgment in the action."

In *Minor v. Terry*, 6 How. 208, similar principles are sustained, in relation to pleading under the Code, generally considered; and it is laid down that, since the abolition of forms, every action is analogous to an action on the case, under the old practice, in which the pleader was accustomed to set forth the facts of his case particularly, and at large. The rule with reference to the particular subject of injunction is thus laid down: "So, in a complaint in equity, in most cases, where an injunction is prayed for, it is competent to set out the facts which constitute the foundation of the right, with particularity and minuteness."

*Coit v. Coit*, 6 How. 53, before cited, is likewise a strong authority in favor of the doctrine that, in equitable actions, the former practice and forms in equity are decidedly to be preferred.

In *Fay v. Grinstead*, 11 Barb. 321, it is laid down, with reference to the system of allegation and counter allegation provided for by the Code, that, in this respect, the pleadings are similar to those which obtained in the courts of equity. See, likewise, as to the doctrine of parties, *McKenzie v. L'Amoureux*,



11 Barb. 516; *Conro v. Port Henry Iron Company*, 12 Barb. 27, (p. 58;) *Ricart v. Townsend*, 6 How. 460.

Such then is the view taken on the one side of the question, which holds that, for practical purposes, a distinction still exists between the pleadings, in actions of a purely legal or purely equitable nature; that, in actions by which general or special relief is sought, as distinguished from those for the simple recovery of money or of damages, a greater latitude of averment will be permitted; and that, wherever the case is one of doubtful cognizance, the courts will be rather disposed to allow doubtful averments to stand, than to strike them out, at the risk of striking out a portion of what the party himself considers to be his case, and, on the statement of which, some species of relief might possibly be grounded at the hearing.

*Restricted View, grounded on the old Common Law Principles.*]—In *Milliken v. Carey*, 5 How. 272, 3 C. R. 250, principles in direct opposition to the above, and, in particular, in direct opposition to those in *Howard v. Tiffany*, above cited, are enounced; and a number of averments, tending to strengthen a case for equitable relief, and, in particular, tending to show the necessity of an injunction being granted, were struck out as surplusage. Though admitting, that there are “actions of legal and equitable cognizance, between which, as heretofore, the Constitution and the laws recognize a distinction,” (on which point the case has been before cited,) the learned judge considered, nevertheless, that, as regards matters of pleading, that distinction does not exist; that, under the Code, a bare and naked statement of the facts sufficient to ground a title to relief, is all that is admissible: and, that nothing more than this can be allowed, even in actions of equitable cognizance, under which head the case itself, (a suit to set aside a trust deed on the ground of fraud,) was clearly to be classified. A number of statements, tending to establish such fraud on the part of the persons against whom relief was sought, were accordingly considered to be irrelevant, and an injunction was denied, upon the complaint as it then stood; on the ground that those statements could not properly stand as part of it, but must be separately brought before the court on affidavit, the pleading itself being confined to a simple statement of the facts constituting the cause of action, to the exclusion of collateral or

corroborating circumstances. See, also, on this last point, *Putnam v. Putnam*, 2 C. R. 64.

In *Floyd v. Dearborn*, 2 C. R. 17, a rigid view on the subject is likewise taken; and in *Barton v. Sackett*, 1 C. R. 96, 3 How. 358, similar principles were indirectly enounced: but the strongest authority in support of this restricted construction, is *Dollner v. Gibson*, 3 C. R. 153, 9 L. O. 77, a decision which, if sustained, reëstablishes the old system of common law pleading in all its strictness, and sets completely at naught the abolition of the forms of that system, enacted by section 140. The opinion in this case declares, in actual words, that that abolition "in reality amounted to nothing," and lays down as a rule, that, *not* "the facts constituting the cause of action," as provided by section 142, as those facts actually occurred; but, on the contrary, the legal conclusions derived from those facts, form, not merely the proper, but the only admissible subjects of averment.

The statement there drawn in question, was one to the effect, that a certain sale was made by one Adam Maitland, as agent on behalf of the defendant, instead of averring the sale, as doubtless might have been done, as one by the defendant himself: and the learned judge granted a motion to strike out all the averments in relation to, or connected with, Maitland's agency, as immaterial, though, by doing so, the whole cause of action was stricken out. See the same case, as hereafter noticed, on the consideration of immaterial or redundant averments, and the measures to be pursued in relation thereto. It would appear, however, that this decision has, in fact, been reversed by the General Term, though that case has not yet been formally reported.

In *Pattison v. Taylor*, 8 Barb. 250, 1 C. R. (N. S.) 174, it was also held, that statements of circumstances, tending to establish that a mortgage, sought to be foreclosed, had been long since paid off, were immaterial; and that payment of such mortgage ought to have been pleaded, and the circumstances stated brought forward as evidence in proof of that averment.

In *Culhoun v. The Bank of Utica*, 7 How. 134, a strictly legal view was taken with reference to the joinder of actions under the Code, both at Special and at General Term; see likewise *Alger v. Scoville*, 6 How. 131, 1 C. R. (N. S.) 303; but the former decision was reversed, and that joinder admitted, on equi-

table principles, by the Court of Appeals, in *Cahoon v. The Bank of Utica*, 7 How. 401.—Notes of Court of Appeals, 30th Dec., 1852.

*Remarks—Liberal View preferable.*—The cases last cited are in unquestionable conflict with those in the previous division, and, it is submitted, in conflict also with the general principle of the Code itself. The spirit of that measure, unquestionably, is to do away with all technical rules, as such—a spirit especially evidenced by sec. 159, which provides that, in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties. See also sec. 176, to a similar effect. The measure, taken as a whole, is one of a remedial, and not of a restrictive nature, and ought to be so construed; and, whenever any doubt exists as to its proper construction, the preponderance ought to be in favor of enlarging, rather than derogating from the remedial provisions it contains. Construing it in this spirit, a plaintiff or defendant ought, within reasonable limits, to be allowed the privilege of stating his case in whatever manner he may choose, provided he comply with the general requisites prescribed. So far, indeed, from any tendency to contract the rules of equitable pleading, and to bind down the mode of averment in equitable cases, by the strict and rigid forms of the common law, being evinced; a directly contrary spirit is manifested, by the positive intention to abolish those forms altogether, as expressed in the preamble, (in which those in equity are not even alluded to;) and by the fact that, in the body of the act, the usual course of equity pleading is prescribed, and the very names of equity pleadings adopted, without alteration, except in the mere substitution of the term “complaint” for the term “bill.”

The principles laid down in the cases last cited are, unquestionably, if sustained to their full extent, a complete abolition of all equitable pleading whatever; and amount to a declaration, that the most rigid rules of averment, according to the spirit of the old common law system, are still enforceable in all their pristine strictness, in all cases, whether of legal or equitable origin.

*Facts, not Conclusions, of Law to be stated.*]—This species of

interpretation, especially as carried out in the last cases, seems also to militate irreconcilably with another important class of decisions, which lay down, in distinct terms, the principle that, under the Code, the actual *facts* of the case form, and form alone, the proper subjects of pleading, and that conclusions of law, as such, are not admissible at all, and, if standing alone, will neither suffice to establish a cause of action, nor to constitute a defence.

Thus, in *Beers v. Squire*, 1 C. R. 88, a mere denial of indebtedness, equivalent to the old plea of *nil debet*, unaccompanied by any allegation of facts, was held to be no defence at all to an action on a promissory note, and the answer was accordingly stricken out as frivolous, and judgment awarded on a motion for that purpose. In *Pierson v. Cooley*, 1 C. R. 91, and *McMurray v. Gifford*, 5 How. 14, the same point was decided; and similar views are expressed in *Mier v. Cartledge*, 4 How. 115; 8 Barb. 75, 2 C. R. 125. In *Mullen v. Kearney*, 2 C. R. 18, though no facts are given, the same principle is applied to all cases, in the following words, *i. e.*: "An answer which admits all the facts on which the plaintiff's cause of action is founded, and merely denies, generally, that the plaintiff has a cause of action, is frivolous, and will be stricken out."

In *Bentley v. Jones*, 4 How. 202, a mere denial of interest in the premises there in controversy, without stating facts to disprove specific allegations, showing that such an interest existed, was again held to be bad, "because it did not involve a traversable fact, but merely a conclusion of law." In *Russell v. Clapp*, 4 How. 347; 7 Barb. 482; 3 C. R. 64; *Glenny v. Hitchins*, 4 How. 98; 2 C. R. 56; *Tucker v. Rushton*, 2 C. R. 59; 7 L. O. 315; *Neevus v. Kloppenburgh*, 2 C. R. 76; *Stewart v. Bouton*, 6 How. 71; 9 L. O. 353; 1 C. R. (N. S.) 404; and *Eno v. Woodworth*, 4 Comst. 249; 1 C. R. (N. S.) 262, the same positions are fully sustained.

Nor do the more recent cases in any manner recede from the position laid down in those above cited. In *Mann v. Moorewood*, 5 Sandf. 557, it is held, that inferences and conclusions of law, are the province of the court, and not of the pleader; and that the complaint should state the facts, and the facts alone. The old chancery system of charge and pretence, is also entirely inadmissible in a pleading, which should state the facts, and the facts alone. *Clark v. Hurwood*, 8 How. 470. See likewise as to an

answer framed on the old chancery mode, *Gould v. Williams*, 9 How. 51. A mere averment of adverse possession, without stating the facts or circumstances, was held bad in *Clarke v. Hughes*, 13 Barb. 147. So also, a complaint in the words of a penal statute, without particularizing the offence committed. *Morehouse v. Crilly*, 8 How. 431. Nor is an express reference to a statute necessary, where facts are alleged which bring the case within its operation. *Goelet v. Cowdrey*, 1 Duer, 132. See too as to a restrictive statute, *Smith v. Lockwood*, 13 Barb. 209; 10 L. O. 232; 1 C. R. (N. S.) 319. So likewise as to a denial of liability, on a note admitted to be made, *Edson v. Dillaye*, 8 How. 273; *Gunter v. Catlin*, 1 Duer, 253; 11 L. O. 201. As to the defence of usury, without stating the facts relied on, *Gunter v. Catlin*, *supra*. As to the facts in relation to notes received by defendant, on which indebtedness was alleged, to show his liability to plaintiff, *Lienan v. Lincoln*, 12 L. O. 29. So also, as to facts to show defendant's liability to plaintiff, on a suit for use and occupation of lands, *Hall v. Southmayd*, 15 Barb. 32. Under the Code there is no general issue, under which proof of the facts which tend to a conclusion of law can be introduced, and they must therefore be specifically averred, when the conclusion is drawn by the court, with whom and whom alone it rests to do so. *Gunter v. Catlin*, *Mann v. Morewood*, above cited.

The point, therefore, that mere conclusions of law are not admissible as matters of defensive pleading, appears to be unquestionably established. If not admissible as a defence, it seems to follow, as a necessary conclusion, that averments of this description, standing alone, are not sufficient for the establishment of a cause of action; and that the facts themselves of the case, as they really occurred, and not the legal conclusion to be drawn from them, ought, in all cases, to be pleaded. The circumstance that the party may be obliged, under the new system, to swear to every fact that he avers in his pleading, and, though willing to swear to such fact as it actually occurred, might most conscientiously object to swear positively to the conclusion of law to be drawn from it, is, also, a consideration entitled to its full weight. It seems to follow, as a necessary consequence from the foregoing premises, that what is law with respect to defensive, must be law with respect to aggressive pleading; and that the principle laid down in *Dollner v. Gibson*, and *Pattison v. Taylor*, *i. e.*, that the legal conclu-

sion derived from the facts of the case, and not the facts themselves, on which that conclusion is founded, as those facts occurred, ought, and ought alone, to be averred in a complaint, cannot be sound. If not, then, *à fortiori*, the principle that such facts cannot be pleaded at all, in the form in which they really happened, and, if so pleaded, will be actually struck out as irrelevant, seems incapable of standing the test of critical inquiry.

Arguments, too, standing alone, are inadmissible as matters of pleading; the material and traversable facts must be alleged, and not left to inference. *Lewis v. Kendall*, 6 How. 59; 1 C. R. (N. S.) 402. See likewise *Gould v. Williams*, 9 How. 51, above noticed.

The mere averment of the intentions of parties in executing a written instrument, without any direct allegations of mistake, or surprise, or any facts tending to such a conclusion, was, in accordance with the general principle, that facts, not conclusions, are to be averred, held to be bad pleading, in *Barton v. Sackett*, 1 C. R. 96; 3 How. 358. Indefiniteness, in general, is an objection which must, on all occasions, be provided against. An answer, not giving proper particulars of a demand of set-off, but following the words of the old common law counts in *assumpsit*, was held to be bad, in *Wiggins v. Gaus*, 3 Sandf. 738; 1 C. R. (N. S.) 117. Thus, also, a bare averment in slander, "that what the defendant said of the plaintiff was true," no facts being stated in support of a justification, was overruled. *Anon.*, 3 How. 406. So, likewise, in an action on a promissory note, where the allegations in the complaint were insufficient, a mere denial that, "by reason of" the allegations in the complaint, the plaintiff was entitled to judgment, without specifically taking the objection, or traversing any point in the complaint, was held to be no denial. *Hoxie v. Cushman*, 7 L. O. 149.

*Constitutive, not Probative Facts to be averred.*—Although, then, the general doctrine of the more liberal cases on the subject of equitable averments, and particularly that laid down in the cases of *The Rochester City Bank v. Suydam*, *Wooden v. Waffle*, and *Coit v. Coit*, appears to be unquestionably preferable; still that doctrine must not be carried too far. A plaintiff seems, doubtless, at liberty to state an equitable cause of action, in substantially the same manner in which it was formerly stated in a well-drawn bill in chancery, according to the rule laid down in

*Howard v. Tiffany*; but still he is by no means freed from the observance of all rules whatever, in relation to his averments of that cause of action; nor is he at liberty to wander into clearly irrelevant matter, or to introduce, as forming part of those averments, matters not bearing directly upon his title to relief, but merely useful as probative facts in support of that title. Though substantially preserved under the Code, the powers of the pleader in relation to equitable averments, are not increased by it. They are, on the contrary, lessened in many respects, inasmuch as the abolition of equitable pleading, as a means of obtaining discovery, of necessity, narrows the field of admissible allegations, and confines them simply to those, directly going to establish a cause of action, or a right to relief connected with that cause.

That the substantive facts of the case, and those only, form the only proper subject of averment, in all pleading whatever, and especially in pleadings under the peculiar provisions of the Code; and that merely collateral or probative circumstances, not directly tending to establish the cause of action, in common law cases, or to bear upon or modify the relief to be granted, where that relief is equitable or special, are inadmissible in all cases whatever, whether legal or equitable; is a leading feature in every decided case upon the subject, whether taking the stricter or the more liberal view of the general question.

In *Boyce v. Brown*, 7 Barb. 80, 3 How. 391, cited at the outset of these observations, the above doctrine is broadly stated. That "issuable facts, essential to the cause of action or defence, and not the facts or circumstances which go to establish such essential facts;" that "facts only, and not the mere evidence of facts," should be stated; are the principles laid down in *Shaw v. Jayne*, 4 How. 119, 2 C. R. 69, and *Knowles v. Gee*, 4 How. 317. In the case of *Williams v. Hayes*, 5 How. 470, 1 C. R. (N. S.) 148, the same views, especially as they are laid down in *Knowles v. Gee*, are fully concurred in; and the authority of the last case is fully confirmed by *The Rensselaer and Washington Plank Road Co. v. Wetzel*, 6 How. 68; and *Stewart v. Bouton*, 6 How. 71, 9 L. O. 353, 1 C. R. (N. S.) 404. In *Howard v. Tiffany*, 3 Sandf. 695, 1 C. R. (N. S.) 99, before cited as one of the strongest cases in favor of the liberal doctrine of averment, the same view is adopted, and statements of probative circumstances were ordered to be stricken out. The same principles

are distinctly stated in *Milliken v. Carey*, 5 How. 272; 3 C. R. 250; *Floyd v. Dearborn*, 2 C. R. 17; *Ingersoll v. Ingersoll*, 1 C. R. 102; *Dollner v. Gibson*, 3 C. R. 153; 9 L. O. 77, (which, on this point, is perfectly in accordance with the other decision;) *Russell v. Clapp*, 4 How. 347; 7 Barb. 482; 3 C. R. 64; *Glenny v. Hitchins*, 4 How. 98, 2 C. R. 56; *Lewis v. Kendall*, 6 How. 59; 1 C. R. (N. S.) 402; *Wooden v. Waffle*, 6 How. 145; 1 C. R. (N. S.) 392; *Stone v. De Puga*, 4 Sandf. 681; *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573; *Harlow v. Hamilton*, 6 How. 475; *Leconte v. Jerome*, 11 L. O. 126. See per contra, *Warren v. Struller*, 11 L. O. 94. This decision proceeds however on peculiar and special grounds, and does not go to the length of shaking the general principle as above stated. There are, besides the above, numerous other authorities, in which the principle either appears in direct terms, or is collaterally referred to, or acted upon.

A similar question has been raised, as to whether, in cases where the defendant is arrestable, allegations of fraud, on which to ground an execution against the person, ought or ought not to be inserted in the complaint; and much discussion has arisen on the subject. The cases in favor of, and against the admissibility of such allegations, are very nicely balanced. The prevailing opinion would seem to be, that such allegations are admissible, if going to the cause of action itself, and stated in a direct and not a probative form, so as to present a distinct issue, without wandering into collateral circumstances. See this point fully considered heretofore, under the head of Arrest.

*Hypothetical Pleading.*—Hypothetical pleading is also clearly bad. Facts, when pleaded, must be pleaded directly and to the point, and neither hypothetically nor alternatively. This is so clear a point, that it seems almost unnecessary to cite authorities on the subject. *McMurray v. Gifford*, 5 How. 14; *Sayles v. Wooden*, 6 How. 81; 1 C. R. (N. S.) 409; *Porter v. McCreedy*, 1 C. R. (N. S.) 88; and *Lewis v. Kendall*, 6 How. 59, 1 C. R. (N. S.) 402; are decisions directly in point. In *Boyce v. Brown*, 3 How. 391, affirmed 7 Barb. 80, the law is also laid down in similar terms, and an answer held to be bad, as being, amongst many other objections, hypothetical. See, also, *Williams v. Hughes*, 5 How. 470; 1 C. R. (N. S.) 148; *Arthur v. Brooks*, 14



Barb. 533; *Clark v. Harwood*, 8 How. 470; *Gould v. Williams*, 9 How. 51. See likewise numerous cases cited below, under the head of Answer, in relation to the defences admissible in cases of libel.

*General Remarks.*]—The above remarks sum up that portion of the general consideration of essentials in pleading, which treats of averments, inadmissible in their nature, and therefore proper to be stricken out on the ground of their irrelevancy or redundancy. The particular considerations on this subject, in relation to each pleading separately viewed, will be treated of hereafter. The remedies of the party aggrieved, in this respect, are either by a motion to strike out the redundant portions under sec. 160; or, as regards defensive pleadings, by an application for judgment, under sec. 152, or sec. 247, if such pleading be wholly irrelevant or frivolous; subjects which will be severally considered hereafter.

*Insufficiency.*]—The grounds of redundant, or mistaken averments, are, however, not the only ones on which pleadings, generally considered, may be impeached; insufficiency is, on the other hand, an objection equally fatal, or even still more so, and one which may, moreover, be taken at any stage of the action. Under this classification may be placed the averment of a bare legal conclusion, unsupported by any statement of facts whatever, as before noticed; but the more common form of defect is the omission to state facts sufficient to constitute a cause of action, or a valid ground of defence.

On this subject, it is more difficult to lay down any rules of universal application; every case must, in fact, depend upon its own circumstances, and each step in pleading has its own peculiar rules as to sufficiency or insufficiency. These questions will therefore be more conveniently considered, as applicable to each distinct stage in the pleadings themselves, and especially under the head of Demurrer, the proper medium, in all cases, for the taking of objections of this nature.

## § 110. *Observations in Conclusion.*

Before quitting, however, the subject of the essential, and entering upon that of the formal requisites of pleadings, gene-

rally considered, one or two general remarks, in the nature rather of cautions than of rules of practice, seem expedient.

In any pleading whatsoever, no greater mistake can be committed, than to aver too much; or, in fact, to aver more than is absolutely necessary, for the purpose of establishing, either the cause of action, or ground of defence.

Every known circumstance of the case must, of course, be well and maturely weighed at the outset. No more dangerous error can, in fact, be committed than to defer a complete investigation in this respect, until the cause approaches a hearing. The probable defence, or probable reply, to be put in, must be realized in the mind of the pleader, whilst framing his original statements, as far as practicable, and his case shaped accordingly.

The insertion of conjectural allegations is, however, on the other hand, a most perilous course, and one to be avoided, under almost every possible state of circumstances, both as affording evidence of a sense of weakness, and also as calculated to suggest the taking of objections that might otherwise have escaped notice. The grand object in all pleadings, should be to state exactly enough to maintain the party's own case, and to furnish a ground for the introduction of the evidence by which it is proposed to be established; to state every thing necessary for these purposes, and to state not one word, not one syllable more. Every unnecessary allegation, however apparently trivial, gives, *pro tanto*, an advantage to the adversary. In every case, too, whilst alleging the necessary facts, care must be taken to allege them, or rather to allege the conclusion founded upon them, in such general terms as to afford ground for the introduction of every species of evidence whatever, either direct or collateral, which may possibly bear upon the issue to be tried. The judicious employment of terms, and even the substitution of one word for another, of almost the same general import, may often accomplish this, and may perhaps lead to the most important ultimate results.

Another general consideration, or rather general caution, and that, a caution not applicable to pleading alone, but to every proceeding in a cause, from its outset to its close, is this, *i.e.*, that wherever the relief claimed, or the statement adapted to the demand of that relief, is grounded upon any special statutory provision, either as contained in the Code itself, or in any

other measure, the exact words of the provision acted upon should, in every case, be followed, and the statutory provision specially referred to; although possibly, in many, the sentence might seem to have a better turn, if some slight deviation were made in the phraseology. If the actual words of the statute are departed from, the party so framing his pleading or proceeding, can never be certain but that the ingenuity of his adversary may detect, and when detected, may avail himself of some latent irregularity or latent defect in his mode of statement; but, if those words be strictly followed, his proceedings must at least be regular in form, and, if he fail in success, it will not be through any omission of his own in that respect. To the judge, too, before whom the matter is to come, a rigorous compliance with this rule cannot but be highly acceptable, because it relieves him from the necessity of an extra consideration of the subject, and also from the liability of having his time wasted, and his attention distracted, with minor and technical points, wholly unconnected with the real merits of the controversy. See the case of *Schroepell v. Corning*, 2 Comst. 132, decided in accordance with these views.

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## CHAPTER II.

### OF THE FORMAL REQUISITES OF PLEADING.

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#### § 111. *Numbering Folios, &c.*

ALL pleadings, or copies of pleadings, of whatever nature, are required, by Rule 41 of the Supreme Court, to be fairly and legibly written, and, where exceeding two folios in length, they must have the folios distinctly marked in the margin. A strict compliance with this rule seems to be very generally dispensed with, but still the rule exists, and, as it may at any moment, or on any occasion, be enforced, the only perfectly safe course will be a literal compliance with it on all occasions.

The courts regard, however, an objection of this nature with little favor. Thus, in *Sawyer v. Schoonmaker*, 8 How. 198, a

motion on this ground was denied, with costs, the papers of the moving party being obnoxious to the same objection. The name and residence of the attorney, or party prosecuting in person, must also be endorsed on any copies served. See Rule 5.

*Numbering Causes of Action, &c.*—By rule 87, inserted on the last revision, it is provided, that “In all cases of more than one distinct cause of action, defence, counter-claim, or reply, the same shall not only be separately stated, but plainly numbered.”

An omission to comply with this rule will clearly be an irregularity. See *Getty v. Hudson River Railroad Company*, 8 How. 177; *Blanchard v. Strait*, 8 How. 83; *Benedict v. Dake*, 6 How. 352; *Lippincott v. Goodwin*, 8 How. 242; *White v. Low*, 7 Barb. 204; *Spencer v. Wheelock*, 11 L. O. 329; *Durkee v. Saratoga and Washington Railroad Company*, 4 How. 226; *Pike v. Van Worner*, 5 How. 171. See this subject hereafter considered under the different heads of Pleading. It seems, however, that this provision is only imperative in relation to a defence, in those cases where that defence consists of new matter, and not to an answer, merely denying the plaintiff's allegations. *Otis v. Ross*, 8 How. 193; 11 L. O. 343.

In *Blanchard v. Strait*, above cited, it was considered that an omission in this respect might constitute a ground for setting a complaint aside. In *Wood v. Anthony*, however, 9 How. 78, this position is denied, and it is held that a motion on the ground of uncertainty is the proper course under these circumstances, and that the court will not grant relief beyond that extent; and an application to set aside was accordingly denied, with costs.

## § 112. *Subscription and Verification.*

*Subscription.*—The first requisite essential in every pleading, is that of subscription by the party or by his attorney—see. 156. This is necessary in all cases, and can never be dispensed with. In practice, the attorney almost universally subscribes, even when the pleading is verified by the party. In *Hubbell v. Livingston*, 1 C. R. 63, the signature to the affidavit of verification was held to be a sufficient subscription to the pleading, though of course this case is one of those which are calculated

to serve as a caution, and not as a precedent. In *Post v. Coleman*, 9 How. 64, a similar subscription to a confession of judgment, was held to be a sufficient compliance with the statute.

*Verification, generally considered.*—The next essential form, with regard to pleadings in general, is that of verification, as to which the Code provides as follows:

§ 157. The verification must be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true: and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the State, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted, when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

This section was extensively amended on the revision of 1851, especially with reference to the powers given to agents or attorneys to verify, instead of their principals, in cases where all the facts are within the personal knowledge of the former. The provisions as to the omission of verification in certain cases, in the two last clauses, are new also, having been omitted in the Code of 1849, though that of 1848 contained a clause to that effect. This last amendment is in accordance with the doctrine laid down in the cases of *Clapper v. Fitzpatrick*, 1 C. R. 69, 3 How. 314; *Hill v. Muller*, 2 Sandf. 684; 8 L. O. 90; *Bailey v. Dean*, 5 Barb. 297; and *White v. Cummings*, 3 Sandf. 716; 1 C. R. (N. S.) 107. This principle was extended to the case of

a party, who, in lieu of verifying his answer, made an affidavit that an admission of the truth of its allegations might subject him to a prosecution for felony; and an answer, put in without verification, but accompanied by that affidavit, was held to be sufficient, in *Springsted v. Robinson*, 8 How. 41. See, likewise, to the same effect, *Thomas v. Harrop*, 7 How. 57.

*Not Imperative.*—It must be observed, however, with respect to verification, that it lies in the option of the plaintiff, as to whether it shall or shall not be made a requisite throughout the suit. Under the Code of 1848 it was otherwise, every pleading under that measure being obliged to be verified. See *Swift v. Hosmer*, 1 C. R. 26; 6 L. O. 317. Under the present measure, or that of 1849, if the complaint be without oath, the answer may be put in in the same form. It is only when any one pleading is verified, that the verification of all subsequent ones, except demurrers, becomes incumbent under sec. 156. It is hardly, however, possible to conceive a case in which the adoption of this precaution by the plaintiff, in the first instance, will not be most essential; and, therefore, as a general rule, it should never be omitted. Such omission will completely deprive him of the benefit of binding down the defendant to the assertion of a true, as well as of a sufficient ground of defence, and it will leave the latter at full liberty to make any allegation he may choose, and thus throw upon his adversary the duty of proving facts, which, in a verified pleading, it would be impossible for him to deny. See *George v. McAvoy*, 1 C. R. (N. S.) 318; 6 How. 200. It was also held in that case, that the verification, in strictness, forms no part of the pleading itself.

Although, however, the plaintiff may omit to verify his complaint, the defendant may force him to do so with regard to his reply, by putting in a verified answer. *Levi v. Jakeways*, 4 How. 126; 2 C. R. 69, reported as *Lin v. Jaquays*, 2 C. R. 29.

A pleading must not be verified before the attorney of the party. If so, it will be a nullity, and may be set aside on motion, if made in due time. *Gilmore v. Hempstead*, 4 How. 153; *Anon.*, 4 How. 290.

*Verification by Party.*—Under the Code of 1849, the most literal compliance with the wording of the section correspondent with that now under consideration, was absolutely essential.

Thus, a verification to the effect that the party "had read the complaint, and that the same was true according to the best of his knowledge and belief," was held to be bad, in *Van Horne v. Montgomery*, 5 How. 238; and, in *Davis v. Potter*, 4 How. 155; 2 C. R. 99, it was even considered that the use of the word "and," instead of "or," between the words "information" and "belief," constituted a defect. Although, perhaps, the words "to the effect," in the present amendment, may give a little wider latitude in cases of evident mistake, a strict and literal compliance with the essentials prescribed by the section as it now stands, is, in reality, indispensable to be attended to under the present measure. A very strict view as to the necessity of following the exact words of the Code, in a substantive allegation to the same effect as the ordinary verification, was taken in the recent case of *Mott v. Burnett*, 1 C. R. (N. S.) 225.

Since that amendment, however, a greater latitude of expression is sanctioned, provided the essentials of the provision be complied with; the criterion being, that, if the truth of the pleading be positively sworn to, the minor incidents of the oath become unimportant. Thus in *Southworth v. Curtis*, 6 How. 271, 1 C. R. (N. S.) 412, the plaintiff's affidavit that the complaint was true, but omitting the words "to his knowledge," was held to be a sufficient verification.

So, also, in *Kinkaid v. Kipp*, 1 Duer, 692, 11 L. O. 313, an affidavit that the answer was true to the defendant's knowledge, omitting the rest of the form, was held to be good.

It would seem from the case of *Finnerty v. Barker*, 7 L. O. 316, that a pleading may be verified on belief, or information and belief only, in a case where none of the facts pleaded are within the personal knowledge of the party himself: as slander, for instance, the matter there in question.

Where, however, the truth of the pleading is alleged, that allegation must not be otherwise qualified than as permitted by the form prescribed. Thus, a verification by the plaintiff, that the complaint was *substantially true*, of his own knowledge, was held to be bad, and the defendants entitled to put in an unverified answer. *Waggoner v. Brown*, 8 How. 212.

In *Truscott v. Dole*, 7 How. 221, it was held that the above form of affidavit does not necessarily imply, that the mode in which the matters are stated appears on the complaint, and, therefore, that all allegations in the latter should be made posi-

tively. The effect and true construction of the oath is, that so far as those matters are within the knowledge of the party, they are true, and, as to the residue, he is either informed or believes them to be true. The same conclusion is come to in *Hackett v. Richards*, 11 L. O. 315.

A pleading may, as above provided, be verified by any one of several parties united in interest and pleading together. Where, however, their interests are severable, the reverse will be the case. Thus in *Andrews v. Storms*, 5 Sandf. 609, it was held that the joint answer of the maker and endorser of a note, verified by the maker only, was bad as regarded the endorser, and, so far as respected his defence, it was stricken out.

A joint answer, put in by defendants, severally as well as jointly liable, must be verified by all of them, or it will be held no answer, as regards those defendants who omit to do so. *Alfred v. Watkins*, 1 C. R. (N. S.) 343.

An amended complaint has been held not to be a "subsequent pleading" within the meaning of the foregoing provisions, and, therefore, not necessary to be verified, though the amendment took place after a verified answer. *Hempstead v. Hempstead*, 7 How. 8.

The court, in *Bragg v. Bickford*, 4 How. 21, allowed a pleading to be verified after it had actually been served, upon good cause shown; though, of course, this case, like all of the same nature, must not be drawn into a precedent for neglect in the first instance. See, however, *George v. McAvoy*, 6 How. 200; 1 C. R. (N. S.) 318, above cited.

The omission of the party's signature to the affidavit of verification, will render the pleading altogether defective. *Laimbeer v. Allen*, 2 Sandf. 648; 2 C. R. 15.

So, also, the omission of the statement of venue, where that affidavit is taken before a commissioner of deeds. *Lane v. Morse*, 6 How. 394.

On service of the copy of a pleading, a correct copy of the affidavit of verification must be added. Any omission in this respect, and particularly the omission of the name of the officer before whom such pleading is sworn, will entitle the opposite party to treat the service as a nullity. *Graham v. McCoun*, 5 How. 353; 1 C. R. (N. S.) 43. See also *George v. McAvoy*, 6 How. 200; 1 C. R. (N. S.) 318, above cited. The omission of the officer's signature itself will, of course, be a fatal objection.



In *Hill v. Thaxter*, 3 How. 407, 2 C. R. 3, it seems to have been considered that the guardian of an infant might properly verify the complaint, in an action brought in his name.

*Verification by Attorney.*]—A greater latitude is, as before observed, given by the recent amendments, in relation to the verification of pleadings by the agent or attorney. It is, however, absolutely essential that the reasons why the affidavit is not made by the party should be set out, on verification by the attorney or agent; if omitted, that verification will be a nullity. *Fitch v. Bigelow*, 5 How. 237; 3 C. R. 216. See also *Webb v. Clark*, 2 Sandf. 647; 2 C. R. 16.

In *Dixwell v. Wordsworth*, 2 C. R. 1, a verification by an attorney, to the effect that the party was absent from the county, and that "from the information furnished this deponent by said defendant, and from his representations, (which are the grounds of this deponent's knowledge and belief in the matter,) he believes the foregoing answer to be true," was sustained by the court.

This case was prior to the recent amendments of the section, by which the powers of the attorney to verify, instead of the party, are greatly enlarged. There is some little ambiguity in the provision, as it stands, unexplained, with reference to the attorney's power to verify in the absence of the party, and for that sole reason; but that ambiguity is fast clearing up, under the interpretation that has been given to these provisions.

In *Hunt v. Meacham*, 6 How. 400, it was at first held that, although the defendants were absent from the State, the verification of the attorney, stating his knowledge to be solely derived from the statements of his clients, was insufficient, because the statements were not derived from his own personal knowledge, or from an instrument in his possession.

Where, however, either of these latter conditions is fulfilled, the verification will be good without a question. *Mason v. Brown*, 6 How. 481.

The doctrine as laid down in *Hunt v. Meacham*, seems, however, to be too restricted, and has not been sustained. In *Stannard v. Mattice*, 7 How. 4, it was held that, where a party is not within the county in which the attorney resides, the latter may verify, though in the absence of a written instrument, or of his own personal knowledge. "The intention is, that the pleading shall

be verified by the party, if within the county where the attorney resides. If not, it may be verified by the attorney. It may also be verified by the attorney, whether the party is within the county or not, when it rests on a written instrument in the possession of the attorney, or when the attorney has personal knowledge of all the material allegations of the pleadings; and, in all cases, the attorney must state in his affidavit of verification, his knowledge or the grounds of his belief, and the reason why it is not made by the party." This conclusion is supported in *Roscoe v. Maison*, 7 How. 121, it being held that the absence of the party from the county is, in itself, a sufficient reason. In *Lefevre v. Latson*, 5 Sandf. 650, 10 L. O. 246, the above views, as laid down in *Stannard v. Mattice*, are supported to the full extent; and the doctrine as laid down in *Hunt v. Meacham* is disapproved of in both cases.

In the Appendix various forms of verification will be found, adapted to the different states of circumstances likely to arise under the present provisions.

*How Answer sworn to out of State.*—In relation to the verification of answers out of the State, where deemed necessary, see heretofore, Book IV., sec. 60, pages 165 and 166, under the head of Affidavits. The officers before whom an answer may be sworn to in these cases, are there clearly pointed out. It may also be taken by commission, in the same manner as the evidence of witnesses out of the State, if thought expedient. See hereafter under that head. It is clear, however, that, under these circumstances, the attorney may now verify instead of the party, and such, therefore, is the course generally, if not universally pursued.

### § 113. *Return of defective Pleading.*

A pleading, defective in form in any of the foregoing, or other respects, should be immediately returned by the opposite party. If he retain it, he will be held to have waived the irregularity, and cannot afterwards take advantage of it; *Laimbeer v. Allen*, 2 Sandf. 648; 2 C. R. 15; *Knickacker v. Loucks*, 3 How. 64; *Levi v. Jakeways*, 4 How. 126; 2 C. R. 69; *McGown v. Leavenworth*, 3 C. R. 151, (in which a return within the same day was held to be a reasonable time;) *White v. Cummings*, 3 Sandf. 716; 1 C. R. (N. S.) 107; *Williams v. Sholto*, 4 Sandf.

641; *Sawyer v. Schoonmaker*, 8 How. 198; and, even if he return the paper, he is bound, in doing so, to point out the nature of the alleged defect; *Broadway Bank v. Danforth*, 7 How. 264; *Sawyer v. Schoonmaker*, above cited. See likewise, *Rogers v. Rathbun*, 8 How. 466; *Hollister v. Livingston*, 9 How. 140.

Although a pleading not duly verified is, in effect a nullity, (see *Swift v. Hosmer*, 6 L. O. 317, 1 C. R. 26,) it cannot be disregarded altogether as such by the opposite party. The proper course is to move to set it aside for irregularity, and such motion must be made on the very first opportunity after the service, or the irregularity will be held to have been waived; *Gilmore v. Hempstead*, 4 How. 153; *Laimbeer v. Allen*, and *Graham v. McCoun*, above cited; *Webb v. Clark*, 2 Sandf. 647; 2 C. R. 16. The last case is also authority, that an objection of this nature cannot be taken by way of demurrer.

In *Fitch v. Bigelow*, 5 How. 237, 3 C. R. 216, above cited, the case of a complaint irregularly verified, a motion of this nature was however denied, but without costs; and it was held that the proper course for a defendant to pursue under such circumstances, was to put in his answer without oath, treating the complaint as if not verified at all. The authority of this case seems, however, to be more than doubtful, in view of the contrary decisions above cited.

### § 114. *Other Formalities.*

The following formal provisions are made by the Code, with respect to matters forming the subject of pleading, either offensive or defensive.

The items of an account alleged, need not be set forth in any pleading, but a verified copy must be delivered to the opposite party, if demanded. See sec. 158.

In pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but it may be stated as having been duly made: sec. 161. If controverted, however, by the opposite party, proof of that jurisdiction will then be necessary on the trial. The jurisdiction of the United States courts is intended, without being specially proved. *Bement v. Wisner*, 1 C. R. (N. S.) 143.

The due performance of a condition precedent, may be

pleaded generally, without stating the facts which show it, and, in an action or defence founded on an instrument for payment of money only, it is sufficient to give a copy of the instrument, and state the sum due under it: sec. 162. See, however, subsequent observations on this clause, under the head of Complaint.

A reference to the title, and date of passage of a private statute, is sufficient for the purposes of pleading it: sec. 163.

The question of irrelevant or redundant matter, and also the provisions of the Code, applicable to any one stage of pleading exclusively considered, will be treated of hereafter. The provisions of sec. 168, under which, every material allegation, not specifically controverted by the opposite party, is to be taken as true, are of course most essential to be attended to on all occasions. The detailed consideration of this branch of the subject belongs, however, more exclusively to the heads of Answer and Reply.

## CHAPTER III.\*

### OF THE CORRECTION OF PLEADINGS BY THE MOVING PARTY.

#### *General Remarks.*

ALTHOUGH, in a great measure, this branch of the subject is of special application, still many considerations of a general nature arise out of it, and will, therefore, be so considered.

Pleadings may be corrected either,

1. By amendment, as of course.
2. By amendment, on leave obtained from the court.
3. By the striking out of improper matter, on the application of the adverse party.

These three subjects will, accordingly, be successively considered; the two first in the present, the last in the succeeding chapter.

#### § 115. *Amendments as of Course.*

[*Statutory Provision.*]—The provision of the Code on the subject of amendments as of course, is as follows:

§ 172. Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended, at any time within twenty days after the service of the answer or demurrer to such pleading; unless it be made to appear to the court that it was done for the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed: and, if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party.

*Time allowed.*—On the first head, it will be seen that twenty days is the time allowed to amend in all cases; but the period from which this time is to be computed is variable, according to the varying circumstances of each case. The weight of authority runs at present, that, in all cases in which service by mail is admissible, the time allowed to amend is doubled in practice, and the party has forty days, instead of twenty, for that purpose. *Washburn v. Herrick*, 4 How. 15; 2 C. R. 2; *Cusson v. Whalon*, 5 How. 302; 1 C. R. (N. S.) 27. This conclusion seems, nevertheless, to be somewhat doubtful; although these cases stand, for the present, alone and uncontradicted. The provisions as to service by mail, occur in that portion of the Code more peculiarly applicable to purely interlocutory proceedings. The date within which a pleading must be served is, in fact, "otherwise provided for," (see sec. 408,) and is imperatively fixed by sections 143 and 153. Under the former, the demurrer or answer must be served *within* twenty days after the service of the copy of the complaint. Under the latter, the plaintiff may, *within* twenty days, reply to new matter in the answer. It may well be contended, that these positive limitations cannot be repealed, by implication from other provisions, not directly applicable to the subject of pleading, but inserted, on the contrary, with peculiar reference to the ordinary notices in a suit, and to the subject of interlocutory motions or other applications during its progress. This construction seems the sounder, and works, in fact, no practical hardship, because it is always in the power of the party, if he require it, to obtain further time to plead, by means of an application in the ordinary manner. It may probably be held, however, that, if duly posted within the twenty days, a pleading may be served by

mail, in cases where such service is applicable; and therefore it would, perhaps, be imprudent to enter up judgment by default, on the non-receipt of an answer, until sufficient time has been allowed for its transmission by due course of post. Where, too, the complaint has been served by mail, it seems clear that this mode of service, with all its incidents, and, amongst others, the extension of time, will be applicable to the answer. See, in affirmance of this view, *Plumb v. Whipples*, 7 How. 411.

No proceeding whatever on the part of his adversary, can prejudice the right of a party to amend within the time allowed to him. *Washburn v. Herrick*, above cited; *Dickerson v. Beardsley*, 1 C. R. 37; 6 L. O. 389; *Morgan v. Leland*, 1 C. R. 123. See, likewise, *Currie v. Baldwin*, 4 Sandf. 690; *Cooper v. Jones*, 4 Sandf. 699; *Griffin v. Cohen*, 8 How. 451; *Rogers v. Rathbun*, 8 How. 466. That right is absolute, subject only to the power of the court to strike out for good cause shown. See, however, the qualifications of this doctrine laid down in *Plumb v. Whipples*, 7 How. 411, before cited.

The service of an answer does not preclude the plaintiff from amending his complaint within the time allowed him. *Clor v. Mallory*, 1 C. R. 126. To a certain extent, the right to amend is a stay of proceedings; and, during its continuance, the adverse party, if he proceed during that time, proceeds at his peril. *Washburn v. Herrick*, above cited. *Plumb v. Whipples*, 7 How. 411. See, however, restrictions on the doctrine below noticed. Thus, if the plaintiff take judgment within the period allowed to the defendant to amend, that judgment will be set aside, if the defendant afterwards does so, and applies to the court. *Dickerson v. Beardsley*, 1 C. R. 37; 6 L. O. 389; *Morgan v. Leland*, 1 C. R. 123; *Griffin v. Cohen*, 8 How. 451; *Rogers v. Rathbun*, 8 How. 466. See, likewise, *Currie v. Baldwin*, 4 Sandf. 690.

Although neither party will be permitted to take judgment, except at his peril, during the time allowed to his adversary to amend; still the right of the latter to do so is not, *per se*, a stay of proceedings for all purposes. Thus, the cause may be noticed for trial immediately on the service of reply, without waiting until the period within which the defendant may amend his answer has elapsed. If the defendant waive that right, which he may do, either expressly, or by himself noticing the cause, the plaintiff will be bound to proceed. *Cusson v. Whalon*,

5 How. 302; 1 C. R. (N. S.) 27. In *Enos v. Thomas*, 4 How. 290, it was held, on a similar principle, that, immediately on reply, the plaintiff may move to refer the cause, under sec. 271, without waiting till the defendant's time to amend shall have expired. Of course, however, he will do so, to a certain degree, at his peril, in the event of an amended pleading being subsequently served, by which the subject-matter of the original reference may undergo alteration. The rights of the party entitled to amend are considerably restricted, and those of his adversary enlarged, by the recent alteration in sec. 172; see this subject noticed below, and the case of *Plumb v. Whipples*, there cited.

An amended pleading takes the place of and supersedes the original, with regard to the time allowed to the opposite party to amend, as well as in other respects. Thus, in *The Seneca County Bank v. Garlinghouse*, 4 How. 174, a plaintiff was allowed to amend his complaint, in due time after the service of an amended answer, although a reply had even been served by him to the defendant's original answer in the cause. The right to do so, involved, of course, a practical recommencement of the pleadings in the cause *ab initio*, although issue had already been joined therein, had not the defendant subsequently amended.

It would seem, therefore, from this case, and from those of *Enos v. Thomas*, and *Cusson v. Whalon*, also above cited, that the defendant has, in all cases, the right to amend his answer, within twenty days after the service of the plaintiff's reply, although, in the section, the words "answer or demurrer" only appear.

Of course, by amending his complaint, the plaintiff alters the period within which the defendant must answer, and he cannot take judgment with reference to the date of the original service. *Dickerson v. Beardsley*, 1 C. R. 37, 6 L. O. 389, above cited.

*How and when Amendment admissible.*—Pleadings in cases transferred from a justice's court, under sec. 60, have been held not to be amendable at all; but this proposition seems to be overruled by the more recent decisions, before cited under the head of the jurisdiction of those tribunals.

In *Plumb v. Whipples*, 7 How. 411, it was held that the powers of amendment, conferred by sec. 172, do not extend to pleadings which do not admit of an answer or reply, and that

an answer merely traversing the allegations in the complaint, and not containing new matter, was not amendable at all.

Where an answer had been stricken out as sham, it was held that the defendant had no right to amend, and a judgment entered up for want of an answer was refused to be vacated. *Aymar v. Chase*, 1 C. R. (N. S.) 141.

An amended answer, the same in its legal effect, though differing in its phraseology from the original one put in, was stricken out in *Snyder v. White*, 6 How. 321. It was held in the same case that, if the time to amend, as of course, be allowed to elapse, no amendment can take place afterwards unless by leave of the court.

In *George v. McAvoy*, 6 How. 200, 1 C. R. (N. S.) 318, it was held that the verification is no part of a pleading, and that, therefore, a second copy of the original complaint, with the verification merely added, was no amended complaint, and might be disregarded. A judgment entered up for want of an answer to the second complaint, the original one having been answered without oath, was accordingly set aside.

Where the opposite party has already given notice of a motion to set aside a pleading as irregular, his costs of that motion must, in all cases, be paid before an amendment can be allowed. The power to amend, as of course, extends only to cases where the proceedings have been regular, or where the amendment is made before any steps have been taken by the opposite party, in consequence of the irregularity sought to be cured. *Williams v. Wilkinson*, 5 How. 357; 1 C. R. (N. S.) 20. See also *Hall v. Huntley*, 1 C. R. (N. S.) 21, (Note.) This principle is, however, to some extent departed from, in *Currie v. Baldwin*, 4 Sandf. 690, where it was held that, if a party amend a frivolous demurrer within due time, a motion for judgment on the demurrer, as it stood, will be denied without costs.

Amendments must be confined to matter in existence at the commencement of the suit. Allegations of subsequent occurrences are irregular, and will be stricken out. The remedy in such a case is a supplemental pleading. *Hornfager v. Hornfager*, 6 How. 13, 1 C. R. (N. S.) 100.

An amendment which involves a change of parties in the action, cannot be made at all, as of course, or without the special leave of the court. *Russell v. Spear*, 5 How. 142; 3 C. R. 189. Nor can a substantially new cause of action be introduced by



amendment, without the express leave of the court. *Hollister v. Livingston*, 9 How. 140; *Field v. Morse*, 8 How. 47.

An amendment, claiming "equitable" relief, in addition to legal relief claimed by the original complaint, under the same state of circumstances, was held to be regular, in *Getty v. The Hudson River Railroad Company*, 6 How. 269; 10 L. O. 85.

An order directing a complaint to be amended in certain particulars, will not preclude the plaintiff from amending, as of course, by the inserting new and material allegations, provided his time for doing so has not expired. The complaint so amended, must not, however, contain any matter directed by the order to be stricken out. It seems, though, that when an amended complaint has been served in conformity with an order, it cannot again be amended without leave of the court, although the time for amending, as of course, may not have expired. *Jeroliman v. Cohen*, 1 Duer, 629.

*Restrictions on power to amend.*]—The provision at the close of the portion of sec. 172, as above cited, is new, and was not in the Code of 1849. It affords a valuable safeguard against the abuse of the power to amend as of course. The portion of that section which provides that such an amendment shall not be permitted, where made for the purposes of delay, has come up for consideration in the following cases, decided since its insertion as above noticed.

The provision in question was acted upon, and the relative rights of the opposing parties defined, in *Plumb v. Whipples*, 7 How. 411. The plaintiff, on service of the answer, noticed the cause for trial, and took an inquest, within the time allowed the defendant to amend; which inquest the court sustained, both because the answer was in itself unamendable, (see same case above noticed,) and also on the following grounds. After noticing the defendant's right to amend, the court proceeds: "But the right so to amend is not to *prejudice the proceedings already had*. Effect is to be given to this provision, and I understand it to have been intended for a case like this under consideration. The plaintiff had a right, when the cause was at issue, to notice it for trial. If the issue noticed for trial still remained, when the time for trial arrived, then he might try the cause, and, if successful, perfect judgment. None of these proceedings are to be prejudiced by a subsequent amendment, even although it

should be made within the time prescribed by the statute. The plaintiff may notice his cause for trial before the time for amending the answer expires. He does so at his peril. That peril is the contingency, that, before he can bring it to trial, the defendant may amend, and thus destroy the issue he had intended to try. On the other hand, the defendant takes the time allowed to him to amend, at the peril of all regular proceedings which may be taken against him before he amends. Such proceedings, whatever they may be, are not to be *prejudiced* by the amendment."

In *Allen v. Compton*, 8 How. 251, the above doctrine is carried still further, and it was held that an amended answer, served for delay, and at so late a period as to throw the plaintiff over the circuit, was a nullity, and might be treated as such. An inquest was taken in that case, and the plaintiff's attorney subsequently moved to strike out the amended answer, as provided for in sec. 172, which motion was granted, and that mode of practice sustained, and laid down to be the only mode the plaintiff could take to save the circuit.

This latter conclusion is however denied, and it is held that an amended pleading, if served within the proper time, cannot, under any circumstances, be disregarded, in *Griffin v. Cohen*, 8 How. 451, which lays down the law as follows: "The right to amend is absolute, subject only to the power of the court to strike out for good cause shown. If the amendment is made in good faith, and not for the purpose of delay, it cannot be stricken out, although the effect may be to deprive the opposite party of the benefit of a circuit or term." The court must first pass upon the intent. The proper course of practice is then laid down as follows: "If the amended pleading shall be served during a circuit or term, the court can, upon a proper case being made, require the party amending to show cause, at a short day, why the amended pleading should not be stricken out—Code, sec. 402—or if, for any reason, this cannot be done before the adjournment of the circuit, application may be made at a special term; and, if the case is brought within the provision authorizing the court to strike out, it can be done, and such terms imposed upon the party thus attempting to avail himself of the statute of amendments in bad faith, as will prevent injury to the adverse party." An inquest taken in that case was therefore set aside, under similar circumstances to

those in *Allen v. Compton*, except that the defendant, and not the plaintiff, was the moving party in this case.

In *Rogers v. Rathbun*, 8 How. 466, a similar view was taken with reference to an amended complaint, and a dismissal taken by the defendant, treating the amendment as a nullity, set aside in like manner. *Griffin v. Cohen* is expressly referred to, and it is held that the decision in *Allen v. Compton* is not necessarily inconsistent with that practice. The distinction drawn is, that, in the latter case, the plaintiff did not rely solely on the inquest, but expressly moved to strike out the answer, which gave the defendant an opportunity to repel the charge, and explain the suspicious circumstances.

The doctrine in *Griffin v. Cohen*, and *Rogers v. Rathbun*, seems, on examination, to be preferable. The inquest taken in *Allen v. Compton*, amounted in fact to little more than surplusage. It was evidently not relied upon, *per se*, or the subsequent motion would not have been made; and, if the motion to strike out be granted, though made after the circuit, it in effect gives the defendant all the benefit, which the species of inchoate inquest, like that in *Allen v. Compton*, could have afforded. The case presents a close analogy to the motion for judgment on a frivolous pleading, under sec. 247, in which, the motion, whenever made, affords all the relief that is requisite, and the practice may well be considered as analogous in all respects. The remedy of striking out seems too to be only appropriate in very gross cases, and the imposition of proper terms to be the more usual course contemplated by the section, as it now stands.

This form of proceeding seems also to be clearly in view in *Cooper v. Jones*, 4 Sandf. 699, in which, after laying down that the right of the party to amend, as of course, after the receipt of a demurrer, is absolute, the court proceeds as follows: "The only exception made by the Code is, that the party shall not amend for the purpose of delay. If it be made for delay, the court will strike it out, or impose terms on the party."

### § 116. *Service of Amended Pleading.*

It will be observed, that, on the amendment in sec. 172, above noticed, an oversight has been committed by the legislature. As the sentences now run, it might seem that the service of a copy of the amended pleading is only obligatory, in cases where the

power to amend has been abused, and not in those where the pleading is *bona fide* amended.

There can be no question but that the section in general must be construed in this respect, according to its purport, as it stood in the Code of 1849.

In every case, therefore, in which a pleading is amended, a full and complete copy must be forthwith served upon the opposite party; and, if it be not served within the time allowed, the bare amendment of the pleading itself will be an utter nullity.

Where, after taking judgment by default against one of several defendants, the plaintiff afterwards amended his complaint, in matter of substance, and not of mere form, it was held that he must serve a copy on the defendant in question, and give him an opportunity of defending, if so advised. *The People ex rel. Rumsey v. Woods*, 2 Sandf. 652, 2 C. R. 18. The fact that, by a subsequent amendment, a previous judgment by default is practically set aside, should therefore be borne in mind by all plaintiffs in similar cases.

The above rule as to service is, of course, applicable to all cases whatsoever, whether falling under the principles of the previous, or of the succeeding section.

### § 117. *Amendments by leave of the Court.*

We now come to consider, in the second place, the nature of the amendments which will be permitted, on special application to the court for that purpose.

The section peculiarly relating to these applications is sec. 173, which runs as follows:

§ 173. The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

See *Chapman v. Webb*, 6 How. 390, 1 C. R. (N. S.) 338, as to word "or," in the last place in which it appears in this section.

It will be observed that this provision, though, in its general

scope, it bears reference to the subject now under consideration, is also of wider operation.

Whether an amendment of this nature should or should not be allowed at the circuit, is a question addressed to the discretion of the judge, and his decision is not the subject of review; *Phinck v. Vaughan*, 12 Barb. 215; nor is it a subject of exception; *Brown v. McCune*, 5 Sandf. 224.

The test as to changing the cause of action or defence, was first inserted in general terms on the amendment of 1841; but, by a trifling change in the wording, on its revision in 1852, its operation is now greatly restricted. As it stood on its first insertion, the condition precedent, that an amendment should not change substantially the claim or defence, was applicable to all cases whatsoever; but, by the present language of the section, that condition is expressly confined to amendments after trial, for the purpose of conforming the pleading or proceeding to the facts proved, and is applicable under no other circumstances. In all other cases, it would seem from *Beardsley v. Stover*, 7 How. 294, that the court, in its discretion, may allow "any allegations material to the case" to be inserted in the pleading, even though the effect may be to change entirely the cause of action or defence; and, in that case, such an amendment was granted, allowing the defendant to add to his answer a counterclaim, pending a reference on the original issue, on proper terms as to time to reply, and a stay of proceedings.

Although it rests in the discretion of the court to grant amendments in all cases, except the one specified, even though they may have the effect of changing the cause of action or defence; still, that test has been, and will probably be still imposed in all ordinary cases, not calling for special relief, under special circumstances. It had been already imposed under the Code of 1849, which was silent on the subject. See *Brown v. Babcock*, 3 How. 305; 1 C. R. 66.

An amendment, involving an entire change of parties, plaintiff and defendant, so as to constitute, in fact, a new suit, was refused in *Wright v. Storms*, 3 C. R. 138. Where, too, the plaintiff had first served a complaint for the recovery of goods in replevin, and afterwards amended, making the action as in assumpsit, and the defendant had served two separate answers, one to each complaint, and entitled accordingly; it was held that both the first answer and the amended complaint were bad, and

a motion to strike out the former was granted, leave being given to move to set aside the amended complaint; in which case, if granted, the first answer was to stand and the second to be set aside. Though irregular, the defendant had no right to treat the amended complaint as a new suit, and to answer in both; he ought to have moved to set it aside in the first instance. See *Megrath v. Van Wyck*, 2 Sandf. 651. See also *Spalding v. Spalding*, 3 How. 297; 1 C. R. 64; *sed vide, per contra, Dows v. Green*, 3 How. 377, where an amendment was allowed, changing the form of action from a claim for damages to one in replevin, on the ground that the cause of action was not changed, but remained the same. The same relief was granted in *Furniss v. Brown*, 8 How. 59. See also these last views enforced, and applied to the provision as it now stands, in *Chapman v. Webb*, 6 How. 390; 1 C. R. (N. S.) 388, the change being there from contract to tort, on the same cause of action. See likewise *Field v. Morse*, 8 How. 47, where an amendment to the contrary effect was also sustained.

In *Houghton v. Latson*, 10 L. O. 32, an amendment, by adding an entirely new ground of defence, was refused, on the ground that such amendment "substantially changed the defence," and was therefore inadmissible, under sec. 173, as last amended.

With reference to amendments made for the express purpose of conforming the pleading to the facts proved, it is laid down in *Fay v. Grimstead*, 10 Barb. 321, that a fatal variance must leave the case unproved in its entire scope and meaning. If left unproved in some particulars, it is a subject for amendment upon terms, if the adverse party has been misled by it, otherwise amendments may be made at the trial, and without any conditions whatever.

An amendment, for the purpose of averring words, on which slander was brought, in the original language, was held not to be a substantial change of the cause of action, and to be admissible, in *Debaie v. Lehind*, 1 C. R. (N. S.) 235.

Where the cause of action is not substantially changed, the courts are disposed to show great liberality on the subject of amendments, involving a change of parties. See *Dutcher v. Slack*, 3 How. 322, 1 C. R. 113; *Vanderwerker v. Vanderwerker*, 7 Barb. 221; *Brown v. Babcock*, 3 How. 305; 1 C. R. 66; *Bemis v. Bronson*, 1 C. R. 27: the two former being cases of adding the names of necessary plaintiffs, the two latter of striking out

unnecessary defendants. In *Barnes v. Perine*, 9 Barb. 202, it was held that a mistake in the names of the plaintiffs, (who in that case were trustees of a religious incorporation,) was not a ground of nonsuit, and that such mistake could be corrected, on the trial, or afterwards by amendment. In *Travis v. Tobias*, 8 How. 333, it was held, however, that an amendment striking out a plaintiff, ought properly not to be made *instantly* on the trial, but on motion, and on just terms.

One plaintiff may be substituted for another by amendment, where the interest of the latter has passed entirely to the former, during the action; and this, even when the matter is actually, at the time of such application, in the course of hearing before a referee. *Davis v. Schermerhorn*, 5 How. 440.

Objections on the ground of misjoinder of parties, will be, in many cases, disregarded at the trial, but with leave to the parties to apply afterwards for an amendment, in case they should think it prudent, with reference to future proceedings. *De Peyster v. Wheeler*, 1 C. R. 93; 1 Sandf. 719.

Where, however, the defect of parties is not merely formal, but actual and important, an amendment of this nature will only be allowed, on payment of all costs since the filing of the original bill. *Johnson v. Snyder*, 8 How. 498.

The name of a next friend was allowed to be inserted in a complaint by amendment, on its being decided that the suit in that case could not be brought by a wife in her own name alone. *Forrest v. Forrest*, 3 C. R. 254. See also *Willis v. Underhill*, 6 How. 396.

With respect, also, to the subject-matter of the action, and the time within which an amendment will be granted, the courts have shown great liberality; thus, where, after a reply had been served, the plaintiff, on subsequent investigation, discovered that a larger sum was due to him than that originally claimed, he was allowed to amend his complaint in that respect. *Merchant v. The N. Y. Life Insurance Company*, 2 Sandf. 669; 2 C. R. 66, 87.

So, too, where, after answer put in, and after the taking of the testimony of a witness, "*de bene esse*," it was shown by affidavit of the plaintiff's attorney, that, in drawing the complaint, he, the attorney, had misunderstood the nature and effect of his claim; an amendment was allowed, on payment of costs. *Hare v. White*, 3 How. 296, 1 C. R. 70. In *Jackson v. Sanders*, 1

C. R. 27, a count on a special contract was allowed to be introduced on amendment, in lieu of the common count on two promissory notes; and, in *The Executors of Keese v. Fullerton*, 1 C. R. 52, a material averment was allowed to be so introduced on payment of costs, which will be in general, it might indeed be said universally imposed, on the allowance of amendments of this nature.

The court, too, will be disposed to allow such amendment, on the adversary's motion to impeach the defective pleading, without putting the party to the expense and delay of a substantive motion for that purpose. *Spalding v. Spalding*, before cited. See also, *Weare v. Slocum*, 3 How. 397; 1 C. R. 105.

Supplemental matter, occurring after the commencement of the suit, cannot be introduced by amendment at all. A supplemental pleading will be necessary. *Hornfager v. Hornfager*, 6 How. 13; 1 C. R. (N. S.) 180.

In *Raynor v. Clark*, 7 Barb. 581, 3 C. R. 230, the plaintiff was allowed to amend his complaint, on the reversal of a judgment erroneously taken by him. In *Lettman v. Ritz*, 3 Sandf. 734, an amendment of the complaint was allowed after the trial, the object of it being formal, and the defendant not complaining of surprise; but terms were imposed.

In *Clason v. Corley*, 5 Sandf. 454, 10 L. O. 237, it was held that a formal amendment of a bill in equity, which had been already taken *pro confesso*, not altering the title of the plaintiff to the relief sought, nor the nature or terms of that relief, though made without notice to the defendant, did not render a subsequent decree against him irregular and void. This species of relief, however, will, under ordinary circumstances, be cautiously administered. See *Field v. Hawchurst*, 9 How. 75.

In *Field v. Morse*, 8 How. 47, an amendment, striking out allegations of fraud, inserted in an action on contract, on motion made by the plaintiff, after judgment by default entered on the original complaint was set aside, was held to be admissible and proper.

In *Bulcom v. Woodruff*, 7 Barb. 13, a plaintiff was allowed to amend his declaration, after he had been nonsuited, and to do so *nunc pro tunc*, as otherwise the statute would have run out; although the court expressly guarded against their decision being drawn into a precedent; and

In *Burnap v. Halloran*, 1 C. R. 51, leave was granted to the



plaintiff to amend, by adding a new count to his declaration, even after two trials had been had, resulting in the defendant's favor; it not appearing that the defendant had been misled, or that the plaintiff sought to introduce a new cause of action.

It would not be safe, however, to calculate, in other instances, upon the extent of liberality evinced in the two last decisions. That there is some limit to it, is evinced by the case of *Houghton v. Skinner*, 5 How. 420, where, two trials having already been had, the court refused leave to amend, by pleading a former judgment against a co-defendant, (the suit being one against joint contractors,) the matter sought to be so pleaded having been known to the defendant, before issue was originally joined in the cause, so that it might have been pleaded in the first instance.

So in *Malcom v. Baker*, 8 How. 301, leave to amend an answer, after an appeal from a judgment affirmed at General Term, was refused; though, on that affirmance, leave had been given to the defendants to make the application. It was held that the judgment must first be set aside, before such leave could be given, and that such a motion could not be entertained by the Special Term. Even if this could be done, it should not only appear that the party has been surprised or misled, after the exercise of ordinary care and skill, but also, that the amendment asked for is clearly required, in order to promote the ends of justice, before such a stretch of the power of amendment can be consented to.

Leave to amend will not be granted for the sole purpose of setting up an unconscientious defence, as that of usury. *Bates v. Voorhies*, 7 How. 234. See too, *Gunter v. Catlin*, 1 Duer, 253, 11 L. O. 201. So also, as to setting up a re-sale of property for which notes had been given, as a defence in an action on those notes. *Davis v. Garr*, 7 How. 311.

The subject of amendments on the trial will be reconsidered in the subsequent chapter, devoted to that stage of the action.

It is essential, in order to the power of the courts to amend, that the application for that purpose should be made in a suit duly existent. Thus, where, in a suit transferred from a justices' court, the plaintiff had deposited a summons and complaint with the justice; and the defendant, in ignorance of his having done so, had omitted to give an admission of service, within the time prescribed by sec. 56, the court disclaimed any power to

grant relief under those circumstances. No summons had been served, and consequently, no action was pending, in which they could exercise jurisdiction. *Davis v. Jones*, 4 How. 340; 3 C. R. 63. This objection is, however, capable of waiver, by any proceeding, such as the acceptance of an answer, which recognizes the matter as pending. *Wiggins v. Tallmadge*, 7 How. 404.

An amendment, if allowed at all, should be allowed to be made complete, for all the purposes for which it is required. See *Turek v. Richmond*, 13 Barb. 533, in relation to the practice in justices' courts.

Amendments of the foregoing nature are, as a general rule, only allowable on payment of costs. See *Hare v. White*, and *Executors of Keese v. Fullerton*, above cited. In *Johnson v. Snyder*, 8 How. 498, an essential amendment was only granted, on the terms of the payment of all costs since the filing of the original bill. In *Chapman v. Webb*, 6 How. 390, 1 C. R. (N. S.) 388, it is laid down that an ordinary amendment of the complaint will be allowed, as heretofore, on payment of the costs of the term, and costs of motion, unless the defendant has to change his defence, in which case, he is entitled to the payment of the whole of his costs, up to the time of the amendment.

The subject of supplemental pleadings, in respect of matters arising after the commencement of the suit, will be hereafter considered.

The amendment of a pleading does not render it a subsequent pleading, so far as verification is considered. *Hempstead v. Hempstead*, 7 How. 8. See *supra*, under the head of Verification.

An order, directing a complaint to be amended in certain particulars, does not debar the plaintiff from amending, as of course, in other respects, within the time allowed for that purpose; but he will be precluded from inserting any matter directed to be stricken out by the order. When, however, an amended complaint has been actually served under the order, his right to amend, as of course, will be gone, and he can only do so by leave of the court. *Jeroliman v. Cohen*, 1 Duer, 629.

## CHAPTER IV.

## OF THE CORRECTION OF PLEADINGS, ON MOTION OF THE ADVERSE PARTY.

§ 118. *Preliminary Remarks.*

ALTHOUGH, as was the case with regard to the matters treated of in the last chapter, a variety of considerations, arising out of the subject above proposed, are more peculiarly cognizable with reference to particular stages of pleading; still many also arise, in relation to the subject, when generally considered, in which point of view it will accordingly be here treated.

Objections of this nature most usually arise with reference to the insertion of surplus matter. The ordinary remedy, with respect to deficiency in necessary allegations, is by demurrer. On one point alone, is the proceeding by motion applicable in this latter state of circumstances, and that is with respect to indefinite and uncertain allegations.

The provisions of the Code on this subject, are as follows:

§ 160. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain, by amendment.

§ 119. *When Motion proper Remedy, or the reverse.*

The general practice on motions of this nature is thus laid down by the Superior Court in 2 Sandf. 682, *Anon.*: "On an appeal from chambers, the court decided that, on a motion to strike matter out of a pleading as irrelevant, redundant, or frivolous, it would be governed by the consideration whether it was in any wise questionable as to the matter being good in point of law. If there were any reasonable doubt of the matter being pertinent, the court should put the party to his de-

murrer. In respect to matter palpably redundant or frivolous, the court will strike it out of course." 26th Jan., 1850. The same principles had been previously laid down by the same court in *Corlies v. Delaplaine*, 2 Sandf. 680, 2 C. R. 117.

In all cases where the pleading itself, or any separate statement of cause of action or ground of defence therein, is irrelevant as a whole, and not in part only, the proper mode of raising the question is by demurrer, and not by motion. It then becomes a question of entire insufficiency, not of partial irrelevancy, and a motion under the above section will, in such cases, be denied. *White v. Kidd*, 4 How. 68; *Fabbricotti v. Launitz*, 3 Sandf. 743; 1 C. R. (N. S.) 121; *Benedict v. Dake*, 6 How. 352; *Nichols v. Jones*, 6 How. 355. In an unreported case of *Belden v. Knowlton*, in the Superior Court, the same course was taken, and allegations, refused to be stricken out upon motion, were afterwards held bad upon demurrer. See likewise *Harlow v. Hamilton*, 6 How. 475; *Salinger v. Luck*, 7 How. 430; *Bailey v. Easterly*, 7 How. 495; *Reed v. Latson*, 15 Barb. 9; *Watson v. Husson*, 1 Duer, 242; *Miln v. Vose*, 4 Sandf. 660.

The same principle was applied to a motion under sec. 248, to strike out, as frivolous, an answer which answered the bill of particulars, and not the complaint, in *Scovell v. Howell*, 2 C. R. 33. It was held that the plaintiff's proper course would have been to demur. If there is any reasonable doubt about the matter complained of being irrelevant, the party will be left to his demurrer. See *Bedell v. Stickles*, 4 How. 432, 3 C. R. 105.

Defects of this nature may now, however, be reached by a motion to strike out an answer or defence, as irrelevant, under sec. 152 as last amended; which subject, inasmuch as it goes rather to the annulment than to the correction of the pleading, will be considered hereafter, and the cases in point cited.

The converse of the foregoing proposition is equally sustainable, and, where the objection is in any manner of a partial nature, a motion of the above description will be the only proper course; and a demurrer, if resorted to, will fail. *Smith v. Greenin*, 2 Sandf. 702; *Esmond v. Van Benschoten*, 5 How. 44; *Fry v. Bennett*, 5 Sandf. 54, 9 L. O. 330, 1 C. R. (N. S.) 238; *Bank of British North America v. Suydam*, 6 How. 379, 1 C. R. (N. S.) 325. See, also, *Bailey v. Easterly*, 7 How. 495; *Gray v. Nellis*, 6 How. 290; see likewise numerous other cases below cited.

In *Howell v. Fraser*, 6 How. 221, 1 C. R. (N. S.) 270, it was held, that where a pleading is correct in substance, but not in form, the objection, on the ground of uncertainty, should be raised by motion of the above description, and not by demurrer. See, also, *Fry v. Bennett*, 5 Sandf. 54, 9 L. O. 330; 1 C. R. (N. S.) 238, as before stated.

### § 120. *When Motion to be made, and how.*

A motion of this nature must be made at once, and without delay. This was held in *Isham v. Williamson*, 7 L. O. 340, and *Corlies v. Delaplaine*, 2 Sandf. 680; 2 C. R. 117; overruling *Stokes v. Hagar*, 7 L. O. 16, 1 C. R. 84, even before the rules of the Supreme Court were made. The question is now put out of doubt by Rule 40, which expressly provides that motions of this nature, and also those on the ground of a pleading being indefinite or uncertain, "must be noticed before demurring to or answering the pleading objected to, and within twenty days from the service thereof." See also *Rogers v. Rathbone*, 6 How. 66.

In the Appendix will be found a form of notice of motion, under the above circumstances. The notice should specify exactly the parts objected to. This motion being made on the pleading itself, no affidavit will be necessary. See *Darrow v. Miller*, 5 How. 247, 3 C. R. 241. In case, however, the opposite party does not appear, it will be expedient to be prepared with proof, that the pleading moved upon is the one actually served by him, and of the date when it was so served.

In *Rogers v. Rathbone*, 6 How. 66, above cited, the court held that, on a motion of this description, it was incumbent on the moving party to prove affirmatively, when the pleading moved upon was served, so as to show that the motion is made in good time; and the application in that case was denied, though without costs, and without prejudice, the pleading there complained of being clearly objectionable.

In *Barber v. Bennett*, however, 4 Sandf. 705, this conclusion is denied, and it was held that it is not necessary for the moving papers to show affirmatively that the motion was made in due time, but that, if such be not the case, the adverse party must show the fact, in the same way that he establishes any matter of defence not apparent in the papers; and the authority of

this case is confirmed by that of *Roosa v. The Saugerties and Woodstock Turnpike Road Company*, 8 How. 237.

The right to make a motion of the above description will be waived, by any proceeding recognizing the adverse pleading as sufficient for ulterior purposes.

Thus, it has been held that this right is waived by the service of a reply, *Corties v. Delaplaine*, 2 Sandf. 680, 2 C. R. 117; by the service of an answer, *Goch v. Marsh*, 8 How. 439; or even by the extension of the time to answer or reply, *Bowman v. Sheldon*, 5 Sandf. 657, 10 L. O. 338; *Isham v. Williamson*, 7 L. O. 340; or by noticing the cause for trial, by which the party admits that his adversary's pleading is sufficient to raise an issue, either of law or of fact. *Esmond v. Van Benschoten*, 5 How. 44.

Objections to a pleading must not be split up into different motions. They should all be taken at once, or a second application will not be granted after the failure of the first. *Desmond v. Woolf*, 6 L. O. 389; 1 C. R. 49.

### § 121. *Irrelevancy or Redundancy.*

The question as to what will or will not be considered as immaterial averments, has already been partially gone into in the first chapter of this part, and, therefore, the cases there cited in full, will be only more slightly noticed here.

As might have been anticipated, there has been some discrepancy between the views of different judges, as to what will or will not be considered as irrelevant allegations, some inclining to a strict, and others to a more extended view of the subject.

*Stricter View.*—The following are in favor of a strict construction of the provision :

Where the complaint in slander, after averring a sufficient cause of action, alleged, also, a subsequent usage of the same words on divers days and times, before suit brought, and likewise of other similar words, not specifically alleged : it was held that no evidence could be given on the latter allegations, and that, on a proper application, they might be stricken out as redundant, but that demurrer would not lie. *Gray v. Nellis*, 6 How. 290.

In *Benedict v. Seymour*, 6 How. 298, it was held that, unless

separate causes of action in a complaint be properly distinguished, and severed into separate allegations, every allegation not essential to a single cause of action, must, if objected to, be stricken out as redundant. Whether this principle is maintainable to its full extent, seems, however, somewhat doubtful; and, even if it should be held to be so, leave to amend would doubtless be granted.

The leading case on the stricter side of the question is, however, *Dollner v. Gibson*, 3 C. R. 153, 9 L. O. 77, before commented on, but now reversed by the General Term, as before noticed. *Floyd v. Dearborn*, 2 C. R. 17, and *Pattison v. Taylor*, 8 Barb. 250, 1 C. R. (N. S.) 174, are also decisions, in which the same severely technical principles were carried out, but the authority of which is now more than doubtful.

*More liberal View.*]—In *Boyce v. Brown*, 7 Barb. 80, 3 How. 391, the more liberal view was laid down in the following terms:

“The pleadings are to be liberally construed, with a view to substantial justice, and the court is to disregard errors and defects, which do not affect the substantial rights of the party.” “It is the duty of the courts, as far as may be, to carry that change into effect, in good faith, and in all its spirit. This must be done by liberal amendments, and by the disregard of every thing formal.”

In *Whitney v. Waterman*, 4 How. 313, a similar tendency was shown, in holding that an order, leaving in immaterial matter, was not appealable, though an order striking it out might be so, if made to appear that such matter involved the merits.

The courts have, in fact, generally shown a disposition rather to discourage motions under this section, than the reverse. An answer in which a valid defence is defectively pleaded, cannot be held to be either irrelevant or redundant, and the plaintiff is not bound to take any objection to it on either of those grounds. *Gould v. Homer*, 1 C. R. (N. S.) 356.

In *Ingersoll v. Ingersoll*, 1 C. R. 102, the following test is given, in relation to applications of this nature:

“The true test of immateriality of averments in a complaint, is, to inquire whether such averments tend to constitute a cause of action, or would, if taken as true, be material to the cause of action; and, if they do, they will not be stricken out.”

See, likewise, *Williams v. Hayes*, *Stewart v. Bouton*, *Rensselaer and Washington Plank Road Company v. Wetsel*, *Newman v. Otto*, *Harlow v. Hamilton*, *Brown v. Orvis*, and *Follett v. Jewitt*, below cited.

*Various Decisions.*]—In one class of cases, it has been insisted that, in construing this section, full effect must be given to the word “aggrieved,” and that, before a party can move to strike out matter from his adversary’s pleading, he must show that he is “aggrieved” thereby. *White v. Kidd*, 4 How. 68; *Hynds v. Griswold*, 4 How. 69. In the latter case, the doctrine is laid down most unequivocally, and the learned judge was also inclined to think that a defendant is at liberty to state, in his answer, any facts which it would be material for him to prove at the trial, though such facts may not constitute a complete defence.

The general doctrine of these two cases is sustained by subsequent decisions, though with some qualifications.

In *Bedell v. Stickles*, 4 How. 432, 3 C. R. 105, the law, as laid down in the last two cases, is mentioned with approbation, and the unfavorable disposition of the court towards these motions is strongly evinced; it is there laid down, that the rule, to be acted upon by the court, should be in analogy to that of the old Supreme Court in relation to frivolous demurrers, and that, therefore, in all cases where there was any question, or ground for argument about the matter being irrelevant or not, the application should be refused. The matters complained of must, therefore, under the authority of this case, be clearly and undoubtedly irrelevant, or the party will be left to his demurrer.

The doctrine of the above decisions is also strongly upheld by those of *Burget v. Bissell*, 5 How. 192, 3 C. R. 215; *The Rochester City Bank v. Suydam*, 5 How. 216; and *Hill v. McCarthy*, 3 C. R. 49, before fully cited in the observations as to averments in pleading. See, also, *Esmond v. Van Benschoten*, 5 How. 44; *Carpenter v. West*, 5 How. 53; *Rensselaer and Washington Plank Road Co. v. Wetsel*, 6 How. 68; *Benedict v. Duke*, 6 How. 352; *Clark v. Harwood*, 8 How. 470. In *Follett v. Jewitt*, 11 L. O. 193, the rule in these cases is thus laid down, viz: that, unless it is clear that no evidence can properly be received under the allegations objected to, they will be retained until the trial. See, likewise, *Root v. Foster*, 9 How. 37.



The point, therefore, that, on motions of this nature, the old chancery rules, with reference to exceptions for impertinence, will still be substantially carried out; although with the modifications necessary in consequence of the fusion of law and equity into one system, (see *Williams v. Hayes*, 5 How. 470, 1 C. R. (N. S.) 148, below cited,) seems to be established by the above series of decisions. See, likewise, *Harlow v. Hamilton*, 6 How. 475.

In *Carpenter v. West*, however, the doctrine in *White v. Kidd*, and *Hynds v. Griswold*, as to the necessity of its being shown that the party is actually aggrieved by the matter objected to, is more strictly defined, and in some respects qualified.

"My own impressions are," says the learned judge, in that case, "that, as to scandalous and impertinent, irrelevant, and redundant matter, the Code has not in any respect changed the former practice in equity cases." "Its effect upon what, before the Code, would have been cases at law, is not now under consideration. If this view is correct, the adverse party may always be considered aggrieved by scandalous, irrelevant, impertinent, and redundant matter, in a pleading. I think one may be considered aggrieved by the interpolation of matter into the pleadings, in a cause in which he is a party, foreign to the case; and he always had a right to have the record expurgated for that reason, without reference to the question of costs." The learned judge then proceeds to lay down the following limitations of the above doctrine: "If relevant, it cannot be scandalous. *Lord St. John v. Lady St. John*, 11 Vesey, Jr., 526, Story P. L. 269, and a few unnecessary words will not make a pleading impertinent. *Del Pont v. De Tustet*, 1 Turn. and Russ. 486; *Des Places v. Goris*, 1 Edwd. C. R. 350; and courts should be liberal, especially until our novel system of pleading shall have become better settled and understood. Every fact, direct or collateral, tending to sustain the general allegations of the bill, may be inserted, if done in a proper manner." "Chancellor Kent thought the best test by which to ascertain whether the matter is impertinent is, to try whether the subject of the allegations could be put in issue, and would be matter proper to be given in evidence between the parties." *Woods v. Morrell*, 1 J. Ch. R. 106.

In *Williams v. Hayes*, 5 How. 470, 1 C. R. (N. S.) 148, the views on this subject, as taken in *Carpenter v. West*, are fully

concurred in, and the qualifications of the doctrine in *Hynds v. Griswold*, assented to, by the learned judge who pronounced that decision. "It is not every unnecessary expression or redundant sentence which should be expunged on motion. But where entire statements are introduced, upon which no material issue can be taken, the opposite party may be "aggrieved" by allowing them to remain in the pleading. If not answered, it may be claimed that such allegations are admitted, and, if denied, the record is embarrassed with immaterial issues. In such cases, it is the right of the adverse party to have the matter improperly inserted in the pleading removed, so that the record, when complete, shall present nothing but the issuable facts in the case. This I understand to be the true spirit and general policy of the system of pleading prescribed by the Code." In a previous part of the opinion, the learned judge laid down the general criterion in such cases as being, whether the allegation "can be made the subject of a material issue. If it can, it has a right to be found in the pleadings; if not, it ought not to be there." See the same principles laid down in *The Rensselaer and Washington Plank Road Company v. Wetsel*, 6 How. 68, and *Stewart v. Bouton*, 6 How. 71; 9 L. O. 353; 1 C. R. (N. S.) 404.

The converse of this last proposition is laid down in *Averill v. Taylor*, 5 How. 476, where it was held that no part of a pleading ought to be stricken out, if it can in any event become material. A prayer for relief introduced into the answer in that case, was, on those grounds, refused to be stricken out. The plaintiff could not be prejudiced by it, inasmuch as it did not require a reply, and no issue could be taken on it.

In *Fabbricotti v. Launitz*, 3 Sandf. 743; 1 C. R. (N. S.) 121, before cited, irrelevant matter is defined to be, that "which has no bearing on the subject of the controversy, and cannot affect the decision of the court." See, also, *Bright v. Currie*, 10 L. O. 104, 5 Sandf. 433.

The grand test of relevancy or irrelevancy would seem, then to be, with some few qualifications, that laid down in various of the above cases, and especially in *Williams v. Hayes*, viz: whether the allegation sought to be impeached can, or cannot, be made the subject of a material issue.

This principle is distinctly and positively laid down in *Newman v. Otto*, 4 Sandf. 668, with reference to the materiality of allegations in pleading, and how far they will, or will not, be

considered as admitted by non-denial, under sec. 168. See, also, to the same effect, *Harlow v. Hamilton*, 6 How. 475, above noticed. See, likewise, *Brown v. Orvis*, 6 How. 376, and *Follett v. Jewitt*, 11 L. O. 193.

Another general principle is clear, that, in actions formerly of strictly legal cognizance, averments of probative facts are improper, and will, as a general rule, be stricken out as redundant. In actions of an equitable nature, greater latitude will be permitted, but, even in these, unnecessary averments of this nature, only going to collateral circumstances, and not tending to establish the main cause of action, will also be objectionable. See in particular this doctrine, as laid down in *Wooden v. Waffle*, 1 C. R. (N. S.) 392, 6 How. 145, before cited. Statements in pleading may be redundant, and stricken out as such, without being either impertinent or irrelevant.

In *Howard v. Tiffany*, 3 Sandf. 695; 1 C. R. (N. S.) 99, although the principles as to the latitude of averment in equitable actions are liberally laid down, still, certain statements of probative facts appear to have been stricken out as irrelevant, though the particulars of those statements are not given in the report: thus showing that the same general rules prevail in equitable as in legal cases; though wider in their general scope, in those falling under the former category.

The doctrine that, in suits for legal relief, facts, and not the evidence of facts, are alone admissible, is positively laid down in *Stone v. De Puga*, 4 Sandf. 681; *Harlow v. Hamilton*, 6 How. 475; and *Leconte v. Jerome*, 11 L. O. 126.

A number of minor points have been made the subject of special decision, apart from the general principles above noticed.

Matter inserted merely for the purpose of enabling the plaintiff to obtain an injunction, was held to be irrelevant, and stricken out in *Putnam v. Putnam*, 2 C. R. 64. See also *Milliken v. Carey*, 5 How. 272; 3 C. R. 250; but these cases seem to be overruled by *Wooden v. Waffle*, *Howard v. Tiffany*, *Minor v. Terry*, and others before cited in favor of the more liberal doctrine, in the present chapter, and also in a previous one, under the head of that remedy. The latter view seems clearly preferable.

Averments of fraud inserted in a complaint on contract, for the express purpose of laying a foundation for an arrest, were

stricken out in *Lee v. Elias*, 3 Sandf. 736, 1 C. R. (N. S.) 116. See likewise, *Field v. Morse*, 8 How. 47. See this subject elsewhere fully considered, under the heads of Complaint and Arrest. The true principle seems to be, that mere collateral circumstances, exclusively bearing upon the provisional remedy, and not on the main cause of action, are clearly redundant. Where, however, the circumstances which render the defendant arrestable form part of the cause of action itself, as in actions for tort, they are clearly averrable, and should unquestionably be averred.

Any matter not involving a statement of fact, as, for instance, a series of pretences and charges according to the old chancery system, is clearly redundant, and will be stricken out. *Clark v. Harwood*, 8 How. 470. So, also, matter stated by way of argument only is clearly redundant. *Gould v. Williams*, 9 How. 51. Where, too, any portion of a pleading is unnecessary, as, for instance, where matter is stated in reply to an answer not constituting a counterclaim, it will be held redundant and stricken out. *Putnam v. De Forest*, 8 How. 146. So also with regard to superfluous counts, inserted in a pleading framed on the model of a declaration under the old practice. *Stockbridge Iron Company v. Mellen*, 5 How. 439; *Root v. Foster*, 9 How. 37; *Dows v. Hotchkiss*, 10 L. O. 281.

A joint answer by two parties severally liable, but verified by one only, was held to be void as to the party not swearing to it, and stricken out, so far as regarded his defence. *Andrews v. Storms*, 5 Sandf. 609. The words, "as plaintiff is informed and believes," were held to be redundant, and stricken out of an answer, in *Truscott v. Dole*, 7 How. 221, it being laid down that all allegations in an answer must be positively made, the form of affidavit of verification being a sufficient qualification, where made on information and belief. See similar views in *Dollner v. Gibson*, above cited. Whether this doctrine is sound, when carried to its full extent, is very doubtful. In a modified sense, however, it is highly desirable that whenever an allegation can be positively made, that form of expression should be used.

Matter in mere mitigation of a recovery, and not constituting an affirmative defence to the plaintiff's case, is clearly redundant, and will be stricken out, except in the single case of libel, where a justification is pleaded, but not otherwise. *Smith v. Waite*,

7 How. 227; *Newman v. Otto*, 4 Sandf. 668; *Brown v. Orvis*, 6 How. 376; *Roe v. Rogers*, 8 How. 356. See this subject fully considered hereafter, in connection with pleadings in libel, under the head of Answer.

Inconsistent claims, too, are inadmissible in the same pleading, and, in such case, the party may be compelled to elect, and the portion rejected will be stricken out. *Smith v. Hallock*, 8 How. 73; *Roe v. Rogers*, 8 How. 356. A motion in this latter form, is recognized as the proper mode of application, where a pleading is impeached for duplicity, in *Gooding v. McAllister*, 9 How. 123. It has been held, however, that inconsistent defences are admissible in the same answer. *Stiles v. Comstock*, 9 How. 48; *Ostrom v. Biaby*, 9 How. 57.

A denial on information only, as a matter within the defendant's knowledge, was held to be insufficient, and stricken out accordingly, in *Edwards v. Lent*, 8 How. 28. A mere denial of plaintiff's ownership of a note, without alleging title in a third person, was stricken out, and judgment granted to the plaintiff, in *Fleury v. Roget*, 5 Sandf. 646. See similar principles laid down in *Edson v. Dillaye*, 8 How. 273; *Hull v. Smith*, 1 Duer, 649, 8 How. 149. See also *Quin v. Chambers*, 1 Duer, 673, 11 L. O. 155, as to the partial striking out of matter of this nature.

An allegation that a party had unreasonably refused to make partition by deed, with a view to charge him with costs, was held to be irrelevant in *McGowan v. Morrow*, 3 C. R. 9.

In *The Stockbridge Iron Company v. Mellen*, 5 How. 439, a complaint against a common carrier, containing what amounted to the six different counts of a declaration under the old practice, was held to be clearly bad; and, unless the plaintiff amended within twenty days, all the causes of action, except the first, were ordered to be stricken out as redundant or irrelevant. See *Blanchard v. Strait*, 8 How. 83, and *Eno v. Woodworth*, 4 Comst. 249; 1 C. R. (N. S.) 262, there cited. See, likewise, *Wood v. Anthony*, 9 How. 78, and *Sipperly v. The Troy and Boston Railroad Company*, 9 How. 83, in which a whole complaint, defective on this account, was stricken out, to give the plaintiff the opportunity of remodelling it in proper form.

In many cases, however, the courts have been less rigid in their application of the doctrine than in the foregoing.

Although a defence may not be *prima facie* sustainable, it does not necessarily follow that it can be stricken out as irrele-

vant: thus, in *Hill v. McCarthy*, 3 C. R. 49, the setting up an equitable title in an answer in ejectment, was refused to be stricken out, though the court considered that the defence was not sustainable, and that the defendant ought to maintain a separate suit.

Allegations as to the due performance of certain ministerial acts by the directors of a Mutual Insurance Company, were refused to be stricken out in *Herkimer County Mutual Insurance Company v. Fuller*, 7 How. 210.

Nor will even undue prolixity, of necessity, make a statement of facts redundant. So held in *Warren v. Struller*, 11 L. O. 94, where the insertion of the whole of a former chancery pleading in an answer, was refused to be stricken out. This conclusion seems, however, to be open to very great doubt, as regards the circumstances of that peculiar case. The distinction between constitutive and probative fact would seem to have been lost sight of, the pleading so set forth appearing clearly to fall within the latter category.

A similar principle appears to have been in the view of the court in *Johnson v. Snyder*, 7 How. 395.

Where, too, matter, though clearly redundant, was not prolix, and did not tend to charge or encumber the record, it was held in *Clark v. Harwood*, 8 How. 470, that it will not be stricken out. With reference to prolixity, as affecting the question of costs under the old practice, see *North American Fire Insurance Company v. Graham*, 5 Sandf. 197.

A party who has himself made distinct though immaterial allegations, cannot impeach his adversary's pleadings in answer to them for redundancy. *King v. Utica Insurance Company*, 6 How. 485.

Nor can he do so with reference to facts omitted to be averred by himself, but necessary to be alleged by the adverse party. *Lord v. Cheseborough*, 4 Sandf. 696, 1 C. R. (N. S.) 322.

The defendant's general power to amend under a demurrer to his answer, was held to be positive and undeniable, where the proceeding was not taken for delay, although leave granted to him to amend on terms, on granting a previous motion for redundancy, had been allowed by him to expire. *Cooper v. Jones*, 4 Sandf. 699.

When an appeal from an order of this description has been taken, it acts, during its pendency, as a bar to bringing on the

cause for trial by the adverse party. *Trustees of Penn Yan v. Forbes*, 8 How. 285.

## § 122. *Motion for Uncertainty.*

Objections to pleadings, on the score of indefiniteness or uncertainty, do not appear to be of such frequent occurrence. In *Smith v. Shufelt*, 3 C. R. 175, a motion of this nature was refused; though the answer merely alleged, on information and belief, that the plaintiff had received something on account of his demand, and was not entitled to the whole sum claimed. The allegation there appears to have been, at all events, sufficient to raise an issue, on which the real question between the parties would be triable.

In *Wiggins v. Gaus*, 3 Sandf. 738; 1 C. R. (N. S.) 117, a stricter view was taken, and it was held that two successive answers, pleading a set-off, the first, by mere reference to the complaint, without stating particulars, and the second, in the words of a common count for work and labor in *assumpsit*, under the old practice, were both of them indefinite and uncertain; and the former of them was stricken out, with costs.

In *Tallman v. Green*, 3 Sandf. 437, it was laid down that a pleading must set forth the case with sufficient certainty, so as to give the court adequate data on which to ground the judgment. The criterion here laid down will be useful on motions of this nature, though, in that case, the objection was raised by demurrer, and sustained by the court. The latter proceeding will, in fact, be, for the most part, the proper course under such circumstances.

In *Blanchard v. Strait*, 8 How. 83, leave was given to the plaintiff to amend his complaint, attacked on other grounds, only on condition of his rendering it more definite and certain, the forms of the old counts having been made use of, and the complaint giving no real indication whatever of the facts relied on. See, likewise, *Wood v. Anthony*, 9 How. 78.

In the former case, another objection was made to the complaint, which also savored of uncertainty, viz., the not dividing it into distinct and separate allegations, as required by Rule 87; and this requisite was also insisted on in *Lippincott v. Goodwin*, 8 How. 242.

In *Otis v. Ross*, 8 How. 193; 11 L. O. 343, it was considered

that a motion on the above ground does not apply to defences, which consist in mere denials of the plaintiff's allegations, but only to those consisting of new matter involving distinct affirmative grounds of defence.

In *West v. Brewster*, 1 Duer, 647; 11 L. O. 157, it was held that this remedy does not apply to cases in which the action is for an account, the particulars of which are omitted to be set forth, but which can be demanded under sec. 158; nor to those cases in which the plaintiff demands an account from the defendant, of matters within his own personal knowledge, and a statement of which he is bound to furnish.

Nor will a bill of particulars be ordered, of items which may enter into the computation of damages, in an action brought under the statute, by the representatives of a deceased person, deprived of life by the negligence of the defendants. *Murphy v. Kipp*, 1 Duer, 659.



## BOOK VII.

### OF THE PLEADINGS IN AN ACTION, AND THE PROCEEDINGS IN CONNECTION THEREWITH, DOWN TO THE JOINDER OF ISSUE.

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#### CHAPTER I.

##### OF THE COMPLAINT, AND THE PROCEEDINGS COLLATERAL THEREWITH.

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##### § 123. *General Definition.*

THIS pleading answers to the declaration at common law, or the bill in chancery, under the old practice. It contains the statement of the case of the plaintiff, under which he seeks relief, and a definition of the relief sought by him. It is, therefore, the foundation of the action, and the original source of all other proceedings, down to the period of its final termination.

In justices' courts, as before remarked, the complaint, and all other pleadings, are verbal, except in certain cases, before adverted to.

*Statutory Provisions.*—The provisions of the Code on the subject of this important pleading, are as follows:

§ 141. The first pleading on the part of the plaintiff, is the complaint.

§ 142. The complaint shall contain:

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

### § 124. *Formal Requisites.*

*Title.*]—The first requisite, then, for the regularity of a complaint, is, that it should be properly entitled, a precaution which ought indeed to be observed, with reference to every pleading or proceeding in the cause. The questions as to the name of the court in which relief is sought, have already been anticipated, and the cases thereon cited, under the head of Summons. It is peculiarly essential that this should be properly stated in the complaint, and that the names of the parties should also be correctly given. A practice has obtained of occasionally entitling this pleading, by the name of the plaintiff, and the name of the first defendant alone, with the words “*et al.*” subjoined, to signify that there are others. This seems to be decidedly incorrect, and contrary to the evident meaning of the statute. It is, however, one of that species of objections which the court will, in no case, allow to be insisted upon, to the obstruction of justice. Thus, in *Hill v. Thaxter*, 3 How. 407, 2 C. R. 3, where the complaint was entitled, “*Emily Hill, &c. v. Christian Thaxter*, instead of *Emily Hill*, by *Daniel Hill*, her guardian, that title was sustained, inasmuch as the facts of *Daniel Hill’s* guardianship, and the names, were correctly given in the body of the complaint itself. This is, however, one of those cases of occasional occurrence, which serve rather as beacons to point out the mistakes to be avoided, than as guides in any respect whatever.

*Venue.*]—Another point essential to the proper entitling of a complaint, is the statement of “the name of the county in which the plaintiff desires the trial to be had.” In courts of special jurisdiction, such as the New York Superior Court, and Court of Common Pleas, this precaution is not necessary. The name of the court itself, points out, with certainty, the place where the trial is to be had. In all other cases, however, the precaution is absolutely essential.

The governing sections of the Code on the subject of fixing the venue, are 123 to 125, inclusive. By sec. 123, actions in respect of real or specific personal property, must be tried in the county, in which the subject of the action, or some part of that subject, is situate, and the venue must be laid accordingly; and, by sec. 124, the venue as to actions for penalties and forfeitures, and against public officers, for acts done in the execution of their offices, is also declared to be local, except as regards offences committed on rivers, &c., between two counties, in which case, the action may be brought in either. In foreclosure, the venue must be fixed in the county, or in one of the counties in which the mortgaged premises are situate, without regard to that in which the loan was actually made. *Miller v. Hull*, 3 How. 325; 1 C. R. 113. The foregoing rules do not apply, however, to actions in which the people are a party. In these, the venue may be laid in any county in the State; so held in *People v. Cook*, 6 How. 448. This rule seems capable of being extended so as to create great hardship, if enforced too rigidly, and in all cases.

In *Auchincloss v. Nott*, 12 L. O. 119, it was held by the Superior Court, that a bill for specific performance of a contract was not a local action, and, accordingly, that the court had jurisdiction, though the estate in question was situate in another county.

In actions not of a local nature, the venue may be fixed in any county in which the parties, or any of them, reside, at the commencement of the action; or, if none of the parties reside in the State, the plaintiff is at liberty to designate any county he may choose. In all these cases, however, the plaintiff's power to fix the venue, is subject to the defendant's right to change it, if improperly fixed, or to move the court for a change on other grounds, which subjects will be treated of hereafter. In relation to actions by the People, see *The People v. Cook*, *supra*. The decision in that case proceeds on the ground that the people are resident in every county, and an action may accordingly be brought in their name in any.

*Other Formalities.*—Attention must be paid to the numbering of the folios, and the separation of causes of actions, under Rules 44 and 87, before referred to. See heretofore as to formal requisites of pleading.

### § 125. *Statement of Cause of Action.*

*General Remarks.*]—The next requisite as to the due preparation of the complaint, is that prescribed by subdivision 2, with reference to the proper statement of the cause of action.

The observations as to the necessary averments of fact in this pleading, have, in a great measure, been anticipated in the preceding chapters. It remains, then, to point out some considerations applicable to the proper form of complaint, separately considered, in different special cases. In every instance, as before observed, the statements in it should be strictly confined to facts, establishing, or tending to establish the main cause of action, or the plaintiff's right to some peculiar relief arising out of it, and this with regard to the essence of that relief, and not to its mere form; nothing collateral, nothing unconnected, nothing merely probative, is, strictly speaking, admissible under any circumstances. Whatever be the state of facts to be pleaded, whether simple or complicated in its nature, those facts must be stated as plainly and as concisely as possible, without any unnecessary or avoidable repetition whatsoever; and also with sufficient clearness, so as to give the court adequate *data* on which to ground a judgment. If this last be not the case, demurrer will lie. *Tullman v. Green*, 3 Sandf. 437.

The main grounds of objection, to be more peculiarly guarded against in the framing of the complaint, will be found collected at sec. 144 of the Code, under the head of Demurrer. See hereafter on that subject.

The plaintiff's counsel must be especially careful, that the facts on which the jurisdiction of the court, or the plaintiff's right to sue depends, should be specially and plainly averred, in all cases which admit of any doubt as to either. All facts necessary to confer jurisdiction, must, of necessity, appear upon the record. *Prees v. Ford*, 2 Seld. 176. He must also direct his peculiar attention to the joinder of all proper parties, and to the making a clear, and, above all, a sufficient statement of the cause or causes of action sought to be established, taking the utmost care to separate and classify the latter, where more than one is sought to be enforced in the same proceeding.

The rules with reference to the pleading of judgments, private statutes, or the performance of a condition precedent, as

contained in secs. 161, 162, and 163 of the Code, and before noticed, will, of course, be borne in mind in the framing of complaints where allegations of those natures are necessary.

### § 126. *Joinder of Causes of Action.*

*Statutory Provisions.*—By section 167, special provisions are made upon this last subject as follows :

§ 167. The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of

1. The same transaction, or transactions connected with the same subject of action ;

2. Contract, express or implied ; or

3. Injuries, with or without force, to person and property, or either ; or

4. Injuries to character ; or

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same ; or

6. Claims to recover personal property, with or without damages for the withholding thereof ; or

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

*Separation of Statements.*—By Rule 87, inserted on the last revision, it is now prescribed that “in all cases of more than one distinct cause of action,” &c., “the same shall not only be separately stated, but plainly numbered.” This practice, which had already become general, owing to its obvious advantages, is now imperative. See this subject heretofore considered, and the cases of *Blanchard v. Strail* ; *Getty v. Hudson River Railroad Company* ; *Benedict v. Duke*, and *Lippincott v. Goodwin*, there referred to. See likewise *Spencer v. Wheeluck*, 11 L. O. 329, in which the complaint was clearly bad on that ground.

In *Benedict v. Seymour*, 6 How. 298, it is held that, where several causes of action are joined in one complaint, they must be properly separated and distinctly averred : the words, “and for a further cause of action the plaintiff complains,” &c., being suggested, though not imperatively, as the proper mode of sepa-

ration. If this be omitted, every allegation, not essential to a single cause of action, must, if objected to, be stricken out as redundant. Whether this severely technical view is fully sustainable, remains to be settled hereafter; and doubtless, in the event of any motion under these circumstances, leave to amend would be given. There can be no question, however, but that the form of complaint here prescribed is at once the simplest and the most expedient, and that the wisest course will be to follow implicitly the directions given, when possible.

The necessity of complying with the above provision, and separately stating different causes of action coming under the same head, is demonstrated by the case of *Durkee v. The Saratoga and Washington Railroad Company*, 4 How. 226, subsequently cited under the head of Demurrer, in which the complaint was held to be bad on that ground.

In *Pike v. Van Wormer*, 5 How. 171, the same principle is applied to cases of slander, and it is laid down, that separate statements under the Code are equivalent to the separate counts of a declaration under the old practice.

In *White v. Low*, 7 Barb. 204, it seems to have been considered that an action could not lie, by the endorsee of a note, against the makers and endorsers jointly. The causes of action do not, in that case, appear to have been separately stated. If they had been so, there can be no doubt but that the reverse would have been held.

*Joinder generally considered.*—The question as to the possibility of including claims for legal and equitable relief in the same pleading, before settled, or nearly so, is now put out of doubt by the changes effected in the earlier part of the section.

Subdivision 1 of sec. 167, as above cited, was inserted on the last amendment of the Code, and extends the possibility of joinder of causes of action, to an almost indefinite extent, when arising out of the same transaction; except in so far as that subdivision is controllable by the supplementary clause at the end of the section.

That it is so controlled, was held in *Tompkins v. White*, 8 How. 520, where the joinder of two claims, in respect of the same premises, the one against both defendants, for recovery of possession and damages, the other against one only, for rents received, was held to be incompatible; and a demurrer was sus-

tained, on the above ground, and likewise on that of the inconsistency of such causes of action.

It has been likewise held that the same subdivision only comprises such causes of action as are consistent with each other, and not such as are contradictory. Thus, in *Smith v. Hallock*, 8 How. 73, it was held that the plaintiff could not seek to recover, in the same action, the possession of a piece of land held by the defendant under a lease, and likewise damages for obstructing a right of way over part of it, claimed by the plaintiff, as not comprised in the lease there in question.

In *Hulce v. Thompson*, too, 9 How. 113, it was held that two causes of action, the one in ejectment for a house and one part of a farm, and the other for trespass on other portions of the same property, committed by the same defendant, who occupied both, were not connected with the same subject of action, and, as such, were improperly united; and a demurrer was allowed accordingly.

The same doctrine as to the impossibility of uniting incompatible causes of action had been held, previous to the amendment, in *Alger v. Scoville*, 6 How. 131, 1 C. R. (N. S.) 303, with an express view to which decision, the amendment in question would appear to have been passed. In that case the question of demurrer, on the ground of misjoinder of causes of action, is treated at great length. The view sought to be enforced by the plaintiff's counsel was, that any number of causes of action, primarily arising out of contract, however diverse and inconsistent the nature of the contracts sought to be enforced might be, were capable of being joined in one complaint, as all falling within the terms of subdivision 1, of 1851; and this, although some of such causes of action did not affect the whole of the defendants, but only some of them individually, in separate capacities; and although some of them were moreover classifiable under other divisions of the section, and in particular as claims against a trustee, under subdivision 7: although all might be said, in some manner or other, to arise out of "contract, express or implied." This view was most emphatically overruled by the court, the following principles being laid down in the course of the decision: "A legitimate construction of this section, will not permit the joining of causes of action, which belong to more than one class. Although many actions for the recovery of real or personal property arise out of contract, still, they are

not to be united with a simple contract for the payment of money. Each subdivision must be interpreted with reference to the others, and the provision made in the 5th and 6th, for the recovery of real and personal property, to which title is given by contract, shows that the legislature did not intend to include those contracts in the first class; otherwise, many actions would fall under more than one head, and the different classes run into each other; and thus the object of classification would be defeated."

The last clause of the section is then referred to, as fixing the meaning of the legislature, in terms which cannot be misunderstood, and as "equivalent to saying that every cause of action belongs but to one class, and expressly forbidding the union of causes belonging to different classes;" and the practical inconvenience of different issues being joined in the same action, some triable by a jury, and others by the court, is strongly enforced.

Separate demurrers of the different defendants, on the ground of the joinder of causes of action, some arising out of ordinary money contracts, and others against trustees, as such; and likewise on the ground that such causes did not jointly affect all the parties to the action, were therefore allowed, and judgment given accordingly.

The authority of this case is unquestionably shaken, to a great extent, by the amendment of the section, and the insertion of subdivision 1, as it now stands; under which, there seems no doubt as to the power of uniting, in the same proceeding, any number of causes of action, arising out of the same transaction, however inconsistent such joinder may be with the general principles of pleading, as theretofore established.

The principles as to the impossibility of uniting causes of action, which are practically incompatible, as laid down in *Alger v. Scoville*, seem, on the contrary, to be sound, and to subsist still, notwithstanding the amendment; and this view is confirmed by the recent decisions above cited. On that amendment, the word "only," on which great stress was laid in *Alger v. Scoville*, was stricken out of the concluding sentence; but this alteration seems to be little, if at all, more than a change in expression, as the words, as they at present stand, seem certainly capable of bearing the same construction, if no more; and it would, indeed, be a matter of difficulty to contend that such is



not still their sound interpretation. Independent of the above considerations, and even assuming that the views on which the recent amendments appear to be grounded are sustainable to their full extent, the decision in *Alger v. Scoville* seems unassailable, under the particular circumstances of that case, on the ground that all the causes of action there joined, did not affect all the parties to the action, some of them, on the contrary, affecting some, and others, others of the defendants only, in separate capacities.

In *Cahoon v. Bank of Utica*, 7 How. 134, a still more restricted view was taken than in *Alger v. Scoville*, and on similar grounds; but that decision seems clearly unsustainable, and was reversed by the Court of Appeals, in *Cahoon v. The Bank of Utica*, Court of Appeals, 30th December, 1852, 7 How. 401, on the ground that the case was clearly one in which the different objects proposed might all have been combined, in one suit in equity, under the old practice.

The following cases, decided prior to the amendment in question, seem clearly deprived of their authority by its terms:

The first of these is *De Ridder v. Schermerhorn*, 10 Barb. 638, in which it was held that causes of action against a debtor, on a sealed contract, and a guarantor of the debt, by another sealed instrument, on the same paper, could not be joined. The authority of this decision seems indeed doubtful, even under the law as it stood before, and without regard to the amendment.

It is in direct conflict with *Enos v. Thomas*, 4 How. 48. In that case, a contract had been entered into by one instrument, and a guaranty for payment of the amount due added at its foot, and both principal and surety were sued thereon in the same action; under which circumstances, a demurrer, on the ground of misjoinder, was overruled, it being held that the two instruments, taken together, were to be regarded as one transaction, and, consequently, as forming only one cause of action. *Enos v. Thomas*, 4 How. 48.

The next decision falling under this class is *Cobb v. Dows*, 9 Barb. 230, in which similarly restricted views to those above noticed were taken, in relation to the impossibility of suing for the value of goods converted by the defendant, on the ground that such an action sounds partly in tort, and partly in contract. The same is the case with regard to *Furniss v. Brown*, 8 How. 59, in which a demand for specific performance of a contract,

and for delivery of its subject-matter, and a claim for damages in respect of a delay in that performance, were held to be incapable of joinder in the same action. See, too, *Pugsley v. Aikin*, 14 Barb. 114, where a complaint against executors, for the occupation of the same premises, partly by the testator, and partly by themselves, as executors, since his death, was also held bad for misjoinder.

Lastly, in *Spencer v. Wheelock*, 11 L. O. 329, the joinder of causes of action against a debtor under simple contract, and his guarantor by instrument in writing, was held to be incompatible, in a complaint framed as for a common law recovery, and on one single count, against both parties. The complaint in that case was doubtless bad, for want of separation of the distinct causes of action; but, in other respects, the doctrine, as there laid down, seems very questionable, and entirely inconsistent with the subdivision now in question, which does not appear to have been noticed, either by counsel or by the court.

In the following cases, the general principle, as laid down in that subdivision, is recognized:

In *Bogardus v. Parker*, 7 How. 305, it was held that, in a suit for a partition, an account might be taken in respect of a defendant's alleged rights to a specific lien on the premises, and that claims on the property might be disputed as between co-defendants, and tried and settled in the same action, if those claims involved interests in, or liens on the property sought to be partitioned.

In *Ricart v. Townsend*, 6 How. 460, it was held no misjoinder, to unite the surviving partner with the representatives of another deceased, in an action on a contract of the former copartnership.

In *Rodgers v. Rodgers*, 11 Barb. 595, it was held that a reversioner might combine in the same proceeding against the tenant for life, a cause of action for wrongfully cutting wood, and also one for conversion of the wood, when cut, where such causes affect the same parties.

An action against the personal representatives, and also the devisees and heirs of the same testator, to recover a debt due from his estate, will clearly be bad, even though the same parties be entitled to the whole property, both real and personal. The statute is imperative, and requires the creditor, in all cases, to resort to the personalty in the first instance, and to the

descended real estate in the second, before resorting to property in the hands of devisees. The joinder in the same pleading of causes of action against parties standing in these three several, and, as it were, successive capacities, is therefore clearly incompatible, and cannot be effected. *Stewart v. Kissam*, 11 Barb. 271. See, likewise, *Roe v. Swezey*, 10 Barb. 247.

The fusion of subdivisions 2 and 3, of 1851, into subdivision 3 of the present measure, carries out the views previously laid down to the same effect in *Howe v. Peckham*, 6 How. 229, 10 Barb. 656, 1 C. R. (N. S.) 381, and *Grogan v. Lindeman*, 1 C. R. (N. S.) 287, where claims for damages in respect of personal injury, consequential upon injuries to property forming the main subject of the suit, were held to be capable of joinder in one complaint, as forming part of one entire cause of action, and incapable of being separately asserted. See *Sheldon v. Carpenter*, 4 Comst. 579.

In reference to subdivision 4, it has been held that a cause of action for malicious prosecution may be joined with one for slander; they are both "injuries to character." *Watson v. Hazard*, 3 C. R. 218. "Crim. con." has been held to be an injury to the person, and to fall, as such, within subdivision 2. *Delamater v. Russell*, 4 How. 234; 2 C. R. 147.

The questions as to misjoinder of parties, will be found further treated of under the head of Demurrer.

With reference to the above classification, the division to which the action will be ultimately held to belong, will be determined by the nature of the relief demanded in the complaint. *Spalding v. Spalding*, 3 How. 297, 1 C. R. 64; *Dows v. Green*, 3 How. 377. See, likewise, *Rodgers v. Rodgers*, 11 Barb. 595.

In *Maxwell v. Farnam*, 7 How. 236, it was held that a plaintiff cannot so frame his complaint to recover the possession of personal property, as that, if he fail to recover the property itself, he can obtain damages for its conversion; and the complaint in that case, seeking a re-delivery, and also damages for conversion, was held bad on demurrer. In *Spalding v. Spalding*, and *Dows v. Green*, above noticed, a similar course was attempted by the plaintiffs. In both these cases, judgment was demanded for the value of property unjustly detained, thus bringing the action under subdivision 3, but subsequent proceedings were instituted, in order to recover possession of the property itself,

which, if allowed, would have brought the case under subdivision 6; such subsequent proceedings were accordingly set aside, on the principle above stated. In *Otis v. Sill*, 8 Barb. 102, it was, in like manner, held that a claim for a specific equitable lien upon property, could not be enforced in an action to recover possession thereof.

The same principle also prevailed in the case of *Cahoon v. The Bank of Utica*, 4 How. 423, 3 C. R. 110, in which it was decided, that a claim for money had and received, could not be joined in the same complaint with one founded on a refusal to deliver up certain promissory notes, alleged to have been satisfied; though both claims arose out of the same transaction; and the case of the *Commercial Bank v. White*, 3 How. 292, 1 C. R. 68, is precisely to the same effect.

This last conclusion is, however, clearly overruled. It was reasserted in another case of *Cahoon v. The Bank of Utica*, 7 How. 134, but distinctly reversed by the Court of Appeals, 30th December, 1852, 7 How. 401, as above noticed. The other cases above referred to, in relation to replevin, seem also open to a similar qualification, with reference to subdivision 1, as it now stands.

In *Pettit v. King*, decided by the Court of Appeals, 31st Dec., 1852, it was held that the plaintiff could not recover in trover, when the evidence showed a rightful sale of the property in question by the defendant, as a trustee, but a detention of the surplus produce; a claim against a trustee cannot be united in the same action with one for the wrongful conversion of property.

### § 127. *Right of Plaintiff to sue.*

The general aspect of this question, and the various rights of parties to commence an action, when laboring under disability, or acting in right of others, have already been fully considered, and numerous cases in relation thereto cited, in a previous chapter, under the head of Parties, to which the reader is therefore referred.

In addition to the instances there stated, a few more matters in this connection require consideration, which fall appropriately under the present head.

The complaint in an action must conform to the summons,

and a variance between them will be fatal. Thus, where the plaintiff issued the summons as administrator, but framed his complaint as suing in his own right, the proceedings were set aside on the above ground. *Blanchard v. Strait*, 8 How. 83.

It is competent for a plaintiff, if he so think fit, to waive tort, and sue upon contract in respect of the same transaction, as under the old practice. *Hinds v. Tweddle*, 7 How. 278.

An action against both of the parties to a joint and several contract, binding them not to exercise a certain trade within certain limits, was held to be unsustainable, on allegations of a breach by one of them only, and a demurrer was allowed on that ground. *Lawrence v. Kidder*, 10 Barb. 641.

Where two partners had agreed to dissolve copartnership, and that the concerns of the firm should be wound up by one of them only, it was held that, pending that winding up, the other partner could not institute proceedings for the appointment of a receiver, no fraud being alleged. *Weber v. Defer*, 8 How. 502.

In *Costigan v. Newland*, 12 Barb. 456, it was held that an agent, holding moneys in his hands, which his principal was in effect liable to pay over to a third party, was not responsible to, and could not be sued by the latter, though notified of his claim. To his principal, however, an agent who has received and neglected to pay moneys over, is directly responsible, and can be sued without any previous demand. *Hickok v. Hickok*, 13 Barb. 632.

One agent or servant of a common employer cannot, as a general rule, maintain an action against such employer, for injury sustained by reason of the misfeasance or negligence of other parties, standing in the same capacity. *Sherman v. Rochester and Syracuse Railroad Company*, 15 Barb. 574.

Where, though, the employer is himself chargeable with any negligence in respect of the facts out of which such injury arose, this rule will not hold good. It only applies to those cases where the accident happened without any actual fault of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it happens. *Keegan v. The Western Railroad Company*, Court of Appeals, 12th April, 1853.

Where, however, injuries happened to third parties, through the negligence of sub-contractors, employed by the party who

held the preceding contract, it was held that the original employers were not liable. *Pack v. The Mayor of New York*, Court of Appeals, 12th April, 1853; *Gent v. The same*, same court, 18th April, 1854.

In *The Mutual Insurance Company of Buffalo v. Eaton*, 11 L. O. 140, it was held that an Insurance Company, who had paid a loss occasioned by collision, could not maintain an action in their own name against the wrong-doer; but that such an action could only be brought in the name of the owner of the property injured; it being further held, that the company, under such circumstances, has a right to bring an action in that form, on indemnifying the actual plaintiff, and would be protected against his acts. A demurrer was accordingly allowed on that ground.

In *Cook v. Genesee Mutual Insurance Company*, 8 How. 514, it was held that one of several assignees of an entire demand, might maintain a separate action, in the nature of a suit in equity to recover his part.

An administrator may sue on a promissory note, made to him as such, either in his private or his representative capacity. And, in an action under the Code, it is not necessary for him to make proof of his letters of administration. *Bright v. Currie*, 5 Sandf. 433; 10 L. O. 104. In *Merritt v. Seaman*, 2 Seld. 168, the same doctrine is laid down, as to the right of an executor to sue, at his election, under similar circumstances.

A party, acting as next friend of a plaintiff under disability, will not be concluded as to his own rights in the premises, by reason of his allowing his name to be made use of in that capacity. *Darwin v. Hatfield*, Court of Appeals, 30th Dec., 1852.

An action will not lie upon a voluntary subscription paper. It is a mere *nudum pactum*, with no consideration to uphold such a promise. *Stoddard v. Cleveland*, 4 How. 148.

A subscription to the stock of a company, formed for a profitable object, and which entitles the party to shares in the undertaking, does not, however, fall within this category, and an action can be maintained upon it. *Oswego and Syracuse Plank Road Company v. Rust*, 5 How. 390. The defendants were also there held to be precluded from questioning the plaintiffs' legal existence as a corporation, by having subscribed for their stock. See *Dutchess Cotton Manufactory v. Davis*, 14 Johnson, 238. The allegation that the defendants subscribed for their shares,

was held to imply, legally, that they were the owners of and entitled to such shares, and to render a specific allegation of consideration, by virtue of the subscription, unnecessary.

In *Barnes v. Perine*, 15 Barb. 249, it was held by the general term, that a subscription paper for the erection of a church edifice could be upheld, and an action maintained upon it, as a common law contract, on parol evidence of actual consideration having been given, though otherwise unsustainable; and, evidence being given in that case, that the trustees of the church had removed and rebuilt the church in question, on the faith of the subscription paper there sued upon, an action upon it was maintained. See decision at special term, to same effect, reported 9 Barb. 202.

In *Dambman v. The Empire Mill*, 12 Barb. 341, it was held that it was competent for a general creditor of an insolvent corporation to institute a suit, and to apply for a receiver of its effects, under the general powers of the court, and without reference to the provisions of the Revised Statutes, which give a similar remedy, on petition, to the holder of a judgment and unsatisfied execution against a body so situated.

An action under the statute of 1847, in respect of the death of a party, caused by the negligence of a steamboat company, is properly brought by the personal representative, though the existence of parties who have sustained a pecuniary loss must be averred. *Safford v. Drew*, 12 L. O. 150.

In relation to corporations in general, the following decisions have been made:

The Board of Health of the city of New York is not a body corporate, or capable of being sued as such. *Gardner v. The Board of Health*, 4 Sandf. 153. Affirmed by Court of Appeals, 30th Dec., 1852.

A member of an incorporated association cannot maintain an action in his own name, as such, for the benefit of the association, without showing his right to sue affirmatively. The general agent of such a society is, however, competent to do so, in his character of trustee. *Habicht v. Pemberton*, 4 Sandf. 657.

The trustee of a company, not a corporation, to whom or to their successors in office, a note is made payable by name, may however maintain an action on it, though others may have succeeded them as trustees. *Davis v. Garr*, 2 Seld. 124.

The proceedings of an inferior tribunal of a municipal cor-

poration cannot be reviewed in an action for that purpose, or otherwise than by *certiorari*, addressed to the subordinate body. *Bouton v. The City of Brooklyn*, 7 How. 198; 15 Barb. 375.

One foreign corporation cannot sue another by attachment, unless the cause of action has arisen, or the subject of the action be situate within the State. *The Western Bank v. The City Bank of Columbus*, 7 How. 238.

In relation to the doctrine of *res judicata*, and how far a prior recovery or award will or will not act as a bar to a subsequent suit in respect of the same, or of collateral matters, see hereafter in the chapter on Answer, under the head of defensive allegations.

### § 128. *Averments of Fact, generally considered.*

The question as to the joinder of causes of action, and the rights of plaintiffs to sue, having thus been disposed of, the next that presents itself for a brief notice, is that as to averments of fact in a complaint, generally considered, though this subject has, in a great measure, been anticipated in a preceding division of the work.

*Facts, not Conclusions, or Evidence.*—The facts of the plaintiff's case form, and form alone, the proper subjects of averment in the complaint; and conclusions of law necessarily arising thereout, as, for instance, a promise to pay, in the case of goods sold and delivered, or indebtedness, where the facts themselves show the defendant to be indebted, need not be formally alleged.

The general principle on this subject is laid down in *Glenny v. Hitchins*, 4 How. 98, 2 C. R. 56, in the following words: "Now, the complaint is good if it contain a statement of the facts constituting the cause of action, in ordinary language. A detail of the evidence of facts on the one hand, and legal inferences on the other, are to be alike avoided." The complaint in that case was for sale and delivery of goods, and was demurred to as containing no allegations of liability, or of a promise to pay; but such demurrer was overruled, inasmuch as both are mere conclusions of law, to be drawn from the facts as pleaded, and are, therefore, not necessary to be averred.

In *Tucker v. Rushton*, 2 C. R. 59, 7 L. O. 315, similar principles are laid down, and a pleading, omitting any allegations of value of goods furnished to the defendant, or of a promise to



pay for them, was sustained, though commented upon as carelessly drawn. In *Neefus v. Kloppenburgh*, 2 C. R. 76, the complaint alleged that the defendant was "indebted to the plaintiff on an account for flour sold and delivered," &c., and was demurred to, on the ground that the legal conclusion was thereby pleaded, and not the facts. This demurrer was stricken out as frivolous, at special term; but the general term reversed the order, on the following grounds: "The Code prescribes the form of the complaint. It is not to contain results or conclusions of law, but the facts themselves, out of which the conclusion arises. In this case, the sale and delivery are the facts which constitute the cause of action, the indebtedness is the result." The court, though refusing to pronounce the demurrer frivolous, gave, however, no opinion as to its ultimate fate.

The view taken in the above cases, is strongly enforced in *Milliken v. Carey*, 5 How. 272, 3 C. C. 250, before cited. *Eno v. Woodworth*, 4 Comst. 249, 1 C. R. (N. S.) 262, is likewise decisive authority to the same effect. It is also sustained in *Hoxie v. Cushman*, 7 L. O. 149; *Castles v. Woodhouse*, 1 C. R. 72; and *Anon.* 3 How. 406, subsequently cited under the head of Answer. Where, however, indebtedness is stated as a fact, and not as a conclusion of law, a denial of it may form a proper subject of averment in the answer. See *Anon.* 2 C. R. 67, also there cited.

In *Garvey v. Fowler*, 4 Sandf. 665, 10 L. O. 16, the following general principles are laid down, on the subject of the framing of complaints, under the Code. After laying down, as one of the merits of that measure, that the system of general averments, which conveyed no information to the opposite party, is abolished, the learned judge proceeds as follows: "The plaintiff must now state in his complaint all the facts which constitute the cause of action; and I am clearly of opinion that every fact is to be deemed constitutive, in the sense of the Code, upon which the right of action depends. Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred, and every such averment must be understood as meaning what it says, and, consequently, is only to be sustained by evidence which corresponds with its meaning."

Similar principles to the above will be found enounced on the subject of Answer or Reply, in *Beers v. Squire*, 1 C. R. 84; *Pier-*

*son v. Cooley*, 1 C. R. 91; *McMurray v. Gifford*, 5 How. 14; *Mier v. Cartledge*, 8 Barb. 75; 4 How. 115; 2 C. R. 125; *Mullen v. Karney*, 2 C. R. 18; *Bentley v. Jones*, 4 How. 202; *Russell v. Clapp*, 4 How. 347; 7 Barb. 482; 3 C. R. 64; *Barton v. Sackett*, 3 How. 358; 1 C. R. 96; *Benedict v. Duke*, 6 How. 352; and other cases also before and subsequently cited.

In the more recent case of *Munn v. Morewood*, 5 Sandf. 557, the principle is stated as follows: "A complaint must state the facts upon which the plaintiff relies, as establishing his right to maintain the action; not, instead of those facts, the inferences which the pleader may deem to be conclusions of law. It belongs to the court to draw the legal conclusions from the facts, which are alleged to constitute the cause of action, and, to enable the court to perform that duty, all those facts must be stated in the complaint."

In *Blanchard v. Strait*, 8 How. 83, it is laid down that the facts constituting a cause of action, must now be set forth in a plain, direct, definite, and certain manner, or the pleading will be objectionable. In *Clark v. Harwood*, 8 How. 470, it is held that the plaintiff is to state the facts which constitute his cause of action, and nothing more. In *Hall v. Southmayd*, 15 Barb. 32, similar general principles are laid down. See likewise, *Lienan v. Lincoln*, 12 L. O. 29. In *Horner v. Wood*, 15 Barb. 371, it is decided that, in alleging a change of interest under a contract, the fact of such change is all that is necessary to be averred, without going into minute particulars.

This last case also lays down the principle that facts, and not the evidence of facts, form alone the proper subject of averment in a complaint, as in all other pleadings. See this subject considered *in extenso*, and numerous cases cited, in the preliminary chapter of the preceding division of the work.

*Old Forms, how far adoptable.*—The old forms of counts in a declaration are, as a general rule, inadmissible as forms of statement of a cause of action. "A more definite, certain, and truthful statement should be given." *Blanchard v. Strait*, 8 How. 83; *Boo v. Woodworth*, 4 Comst. 249; 1 C. R. (N. S.) 262; as likewise *Sipperly v. The Troy and Boston Railroad Company*, 9 How. 83. In a modified degree, however, and with proper curtailment, due regard being also paid to the proposition that the proper subject of statement under the Code is, not the conclusion

of law, but the facts from which that conclusion is derived ; the old forms may be usefully employed as partial, though never as total precedents. See *Hall v. Southmayd*, 15 Barb. 32 ; *Dows v. Hotchkiss*, 10 L. O. 281 ; *Leopold v. Poppenheimer*, 1 C. R. 39 ; *Shaw v. Jayne*, 4 How. 119 ; 2 C. R. 69 ; *Stockbridge Iron Company v. Mellen*, 5 How. 439.

*General Averments abolished.*]—The old system of general averments, which conveyed no information to the opposite party, is altogether abolished. See *Garvey v. Fowler*, above cited. Thus, in *Smith v. Lockwood*, 13 Barb. 209 ; 10 L. O. 232, 1 C. R. (N. S.) 319, a general averment, that the acts of the defendant were contrary to statute, without setting forth in what manner, was held not sufficient, and that such a complaint must set forth facts, by which the court can see that the plaintiffs have sustained, or will sustain some legal injury, or it will be bad on demurrer. See the same conclusion come to with respect to a penal statute, in *Morehouse v. Crilley*, 8 How. 431.

Although, in these proceedings, the facts which bring the case within the statute, and not a mere breach of the statute, must be avowed : still, on the other hand, it is equally essential that, in actions under any special statutory provision, the complaint should strictly conform to the statute sued under, and that statute should be specially referred to. *Schroepfel v. Corning*, 2 Comst. 132.

In an action in respect of professional services, a general averment of the render of such services previous to a specified date, without giving any details whatever, was held to be good, on the ground that it was in the defendant's power to obtain the information he wanted by demand under sec. 158, or by motion under sec. 160. *Beckman v. Platner*, 15 Barb. 550. In *West v. Brewster*, 1 Duer, 647 ; 11 L. O. 157, the same principle was applied to an action against an attorney, for moneys collected by him, and a motion to render the complaint more definite and certain was refused.

*Averments on Belief, various other Decisions.*]—The question as to how far averments may or may not be made on the belief of the party, has been already considered, and the cases cited in the previous chapters. As a general rule, they should be positively made, in all cases where such a form of statement is not manifestly inadmissible.

In actions by a receiver, it is essential that the fact and mode of his appointment should be distinctly averred. *White v. Low*, 7 Barb. 204.

When the plaintiff sues in his own name, but for the benefit of a numerous class of persons, under the powers given for that purpose by sec. 119, his complaint must contain a distinct averment to that effect, or he cannot maintain the suit. *Smith v. Lockwood*, 10 L. O. 12; 1 C. R. (N. S.) 319.

In an action against a surety, under a bond given on arrest, the fact that the person bringing the action is the party aggrieved, must be averred in terms. *Rayner v. Clark*, 7 Barb. 581; 3 C. R. 230.

In an action brought under the statute of 1847, by the representative of a party killed by accident, the fact that there are a widow, or next of kin, who have sustained pecuniary loss, must be specifically averred. *Safford v. Drew*, 12 L. O. 150.

*In Suits by Corporations.*]—The following decisions are applicable to suits by corporations :

In a suit by a foreign corporation, the complaint need not state the act of incorporation or charter at large, or even by reference. *Holyoke Bank v. Huskins*, 4 Sandf. 675. The mere allegation that the plaintiffs sue as a corporation is sufficient; every thing beyond is matter of evidence on the trial. *Stoddard v. The Onondaga Annual Conference*, 12 Barb. 573; *Union Mutual Insurance Company v. Osgood*, 1 Duer, 707. It was held, however, that, if the fact be controverted by the answer, it will be necessary to be proved affirmatively on the trial. *Waterville Manufacturing Company v. Bryan*, 14 Barb. 182.

In *Beman v. Tugnot*, 5 Sandf. 153, it is, in like manner, held that it is sufficient to aver that a contract, sought to be enforced, was in violation of a municipal ordinance, when such ordinance was founded on statute, without pleading the statute itself; and that this rule holds good, as well concerning statutes of local, as those of general application. See similar principles, as laid down in *Horner v. Wood*, 15 Barb. 371; see likewise *Goelet v. Courdy*, 1 Duer, 132.

In *The People v. The Mayor of New York*, 7 How. 81, it is however held, that this principle does not hold good with reference to the ordinances of the Common Council of New York, and that they are not public acts, in such a sense that they can be noticed, without being specially pleaded.

*Other Points.*]—In *Mason v. Jones*, 13 Barb. 461, will be found the particulars of an allegation of the due making and proof of a testator's will, passed upon by the court in that case as sufficient. It is not absolutely necessary, though in all cases it will be advisable, to show affirmatively on the face of the complaint, that a debt sued for had become due before the commencement of the action. *Maynard v. Talcott*, 11 Barb. 569. The word "due," in a general sense, imports, not merely indebtedness, but that the time when payment should have been made has elapsed. *Allen v. Patterson*, Court of Appeals, 30th December, 1852.

In *The Rochester City Bank v. Suydam*, 5 How. 254, also noticed, 3 C. R. 249, a long and interesting discussion will be found on the subject of averments in a complaint, grounded on confidential communications made to an attorney, and as to the circumstances under which such communications may or may not be made use of, and the party considered as exempted from the usual obligation of secrecy in such cases.

*Recovery must be secundum allegata, &c.*]—In framing averments of any kind, the fact that the plaintiff can only recover "*secundum allegata*" must be borne in mind, as the fundamental doctrine of all pleading whatsoever. In *Livingston v. Tanner*, 12 Barb. 481, it is held that this rule is as applicable to actions brought under the Code, as it was before its adoption; that measure requiring, more than ever, the true cause of action to appear upon the complaint. See likewise *Field v. Morse*, 7 How. 12.

In *Bristol v. Rensselaer and Saratoga Railroad Company*, 9 Barb. 158, the doctrine that the plaintiff can only recover *secundum allegata*, is also strictly maintained. The omission of allegations that the defendants were common carriers, that they had received, or were to receive, compensation for carrying the goods, for the non-delivery of which the action was brought, and that they were to receive a reward for carrying those goods, were held to constitute fatal defects. No allegations having been made of those facts, it was accordingly decided that they could not be proved. If, too, a demand of the goods be necessary, to show the plaintiff's right of action, it ought also to be alleged in the complaint. The referee's report in that case was accordingly set aside, on the above grounds.

In *Bailey v. Ryder*, Court of Appeals, 30th Dec., 1852, it is distinctly laid down that no decree can be made in favor of a complainant, on grounds not stated in his bill. The absence of allegations of fraud in a proceeding in equity, was therefore held to preclude all proof of that nature.

In *Field v. The Mayor of New York*, 2 Seld. 179, it is likewise held that facts proved but not pleaded, are not available to the party proving them. In *McCurdy v. Brown*, 1 Duer, 101, the complaint was also dismissed, on the ground that the pleading did not correspond to the proof. When the complaint showed upon its face that the plaintiff's demand was barred by the Statute of Limitations, a mere allegation that the trustees against whom the suit was brought had acted in their representative capacity, by bringing a suit within ten years, without any averment that, by means of that suit, they had received any money, was held to be insufficient to avoid the statute, and that demurrer would lie. *Genet v. Tullmadge*, 1 C. R. (N.S.) 346.

In *Bennett v. American Art Union*, 5 Sandf. 614, 10 L. O. 132, the complaint was dismissed, because on its face the plaintiff had no title to relief. A defect of this nature is fatal at any stage of the action. *Noxon v. Bentley*, 7 How. 316.

A complaint, seeking consequential damages merely, in respect of the performance of acts authorized by statute, cannot be maintained, and demurrer will lie. *Gould v. Hudson River Railroad Company*, 12 Barb. 616. See, also, *Getty v. The same*, 8 How. 177.

### § 129. *Averments of Fact in special Cases.*

We now come to the consideration of the cases peculiarly applicable to the different forms of complaint, on different causes of action, separately considered.

*Averments in Tort, where Defendant arrestable.*—Considerable discussion has arisen as to the necessity of inserting express averments of fraud in the complaint, in cases where the defendant is arrestable under the conjoint provisions of secs. 179 and 288.

In *Barber v. Hubbard*, 3 C. R. 156, the point was left open, and it was considered by *Edmonds, J.*, that there was no impropriety in inserting averments of that nature. In *Gridley v.*

*McCumber*, 5 How. 414, 3 C. R. 211, it was positively held that, in order to warrant an execution against the person under sec. 288, such averments are indispensable; and the same doctrine is laid down still more strongly by *King, J.*, in *Barker v. Russell*, 1 C. R. (N. S.) 5.

In *Corwin v. Freeland*, 6 How. 241, it was likewise laid down at the general term that, where the cause of arrest exists at the time of drawing the complaint, it should be stated in it.

The decision in *Barker v. Russell* was, however, reversed by the general term of the same court in *Barker v. Russell*, 11 Barb. 303, 1 C. R. (N. S.) 57, similar doctrines having been previously held in *Secor v. Roome*, 2 C. R. 1. In *Lee v. Elias*, 3 Sandf. 736; 1 C. R. (N. S.) 116, the like view was most strongly enounced by the Superior Court, and averments of this nature were stricken from the complaint as redundant. See also *Cheney v. Garbutt*, 5 How. 467; 1 C. R. (N. S.) 166; *Masten v. Scovill*, 6 How. 315. This view is further confirmed, and the above conclusion, as stated in *Corwin v. Freeland*, dissented from, in *Field v. Morse*, 7 How. 12. See subsequent application in the same case, reported 8 How. 47; and statements of the same nature are equally inadmissible, when introduced for the first time in the reply. *Brown McCune*, 5 Sandf. 224.

The above conflict of opinion would seem to have been since settled, and the views taken in the latter class of cases decided to prevail, by the Court of Appeals. See 8 How. 49, in report of case of *Field v. Morse*, 8 How. 47, where the doctrine as stated in *Cheney v. Garbutt* is said to have been confirmed.

On a review of the practice, as now settled by these various decisions, the proper course to pursue will be to state the cause of arrest shortly and concisely in the complaint, as a direct, but not as a probative fact, wherever that cause exists as part of the main cause of action, and not collaterally to it, as, for instance, in actions for torts, or debts fraudulently contracted. If the cause of arrest be of a collateral nature, such as an intended removal, a statement to that effect will, on the contrary, be inadmissible, as being in its very nature a probative, and not a principal fact. See this view, as laid down in *Masten v. Scovill*, 6 How. 315, above cited.

*Slander and Libel.*—In slander, the precise words used must be stated in the complaint, or demurrer will lie; nor will it be

expedient to omit a statement of time and place, though the latter omission is not demurrable. *Finnerty v. Barker*, 7 L. O. 316.

The words used must be alleged as having been spoken in the presence and hearing of some one, or the complaint will be defective. *Wood v. Gilchrist*, 1 C. R. 117; *Anon.*, 3 How. 406. An averment to this effect will be the only really safe practice in all cases, though it has been held that the word "published," if used, imports an uttering in the presence and hearing of others, "*ex vi termini*." See *Duel v. Agan*, 1 C. R. 134.

Where the slanderous words have been spoken in a foreign tongue, they must be averred in the original language, with an additional allegation, showing their meaning, and that the parties to whom they were used understood it. *Lettman v. Ritz*, 3 Sandf. 734. See, also, *Pike v. Van Wormer*, 5 How. 171; 6 How. 99; 1 C. R. (N. S.) 403; and *Debaix v. Lehind*, 1 C. R. (N. S.) 235.

In *Phincle v. Vaughan*, 12 Barb. 215, it was held that the imputation of false swearing under oath, without any averment that the words complained of were spoken in reference to a judicial proceeding, was not slanderous *per se*, and a nonsuit under those circumstances was maintained; though it was considered by the court that, if an amendment had been allowed, by inserting an allegation of words proved on the trial, to the effect that if the plaintiff "had had his deserts, he would have been dealt with in the time of it," the action might then have been maintained.

It was held in *Baker v. Williams*, 12 Barb. 527, that slander would lie for an imputation of perjury, on an affidavit made before a justice of the peace, in order to obtain an attachment against a defaulting witness, though such oath was orally taken.

Slander is maintainable by a husband, in respect of slanderous words spoken of his wife, affecting her health and spirits. *Olmstead v. Brown*, 12 Barb. 657.

Words not alleged in the pleadings cannot be given in evidence, *Rundell v. Butler*, 7 Barb. 260; but insinuations, made in indirect terms, may nevertheless be actionable.

In slander, allegations of a subsequent usage of the words complained of, and likewise of other defamatory expressions not specifically averred, are inadmissible, and no evidence can be given upon them; and, on a proper application, they might be stricken out as redundant. *Gray v. Nellis*, 6 How. 290.



Where several causes of action in slander are united in the same complaint, they must be separately stated, or demurrer will lie; *Pike v. Van Wormer*, 5 How. 171; and the same case may be consulted as to what will or will not be held as sufficient averments in cases of that nature. See also 6 How. 99; 1 C. R. (N. S.) 403.

The imputation of insolvency against a petty trader is actionable. *Carpenter v. Dennis*, 3 Sandf. 305.

In cases of either libel or slander, a bare allegation that the defamatory matter had application to the plaintiff, is all that is necessary to be pleaded. No extrinsic facts, for the purpose of showing that application, need be stated; though, of course, if the allegation be controverted, those facts must be proved at the trial. See Code, sec. 164. Where, however, a statement of extrinsic circumstances is necessary to show the meaning of the words themselves, that statement must be introduced. *Pike v. Van Wormer*, above cited. Nor is it necessary to aver malice in terms, where the publication complained of is libellous on its face. The law will imply it on proof of the facts. *Fry v. Bennett*, 5 Sandf. 54, 9 L. O. 330; 1 C. R. (N. S.) 238; *Howard v. Sexton*, 4 Comst. 167; *Buddington v. Davis*, 6 How. 401.

In *Stanley v. Webb*, 4 Sandf. 21, 3 C. R. 79, the law of privileged communications in cases of libel will also be found fully considered, and a number of authorities cited. *Snyder v. Andrews*, 6 Barb. 43, contains also a long discussion on the law of libel in general, and both cases may be referred to with advantage. See also *Cook v. Hill*, 3 Sandf. 341, subsequently cited, and *Howard v. Sexton*, 4 Comst. 157.

In *Cook v. Hill*, 3 Sandf. 341, it was held that no action would lie in respect of a memorial to the Postmaster-General, charging fraud against a successful candidate for a government contract. The communication was held to be a privileged one, if the statements contained in that memorial were true; but otherwise, if they were false. See, likewise, *Buddington v. Davis*, 6 How. 401.

Although a full, fair, and correct report of a trial in a court of justice is privileged, the report must be confined to the actual proceedings, and must contain nothing in addition, nor does the privilege extend to *ex parte* preliminary proceedings before a magistrate. The publisher must find his justification, not in the privilege, but in the truth of the publication. *Stanley v. Webb*,

above cited. See similar principles laid down in *Huff v. Bennett*, 4 Sandf. 120.

An act has recently been passed by the legislature on this subject, (Laws of 1854, c. 130, p. 314,) by which it is provided as follows:

§ 1. No reporter, editor or proprietor of any newspaper, shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication.

§ 2. Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor or proprietor, from an action or indictment for any libellous comments or remarks superadded to, and interspersed, or connected with such report.

§ 3. This act shall take effect immediately.

In *Streeter v. Wood*, 15 Barb. 105, the preferring of charges by one member of a lodge against another, in due form, was held *prima facie* to be a privileged communication, and, if made in good faith, no action would lie.

In relation to the general privilege of an attorney, in reference to communications between him and his client, see *The Rochester City Bank v. Suydam*, 5 How. 254, 3 C. R. 249.

In *Weed v. Foster*, 11 Barb. 203, an imputation of the receipt of money for procuring a public appointment, made against an influential politician, was held to be libellous *per se*.

In libel, it is not necessary to aver express malice, or want of probable cause; these points rather belong to the measure of proof, than to the form of pleading. *Purdy v. Carpenter*, 6 How. 361.

In *Bennett v. Williamson*, 4 Sandf. 60, it was held that an imputation of pleading the Statute of Limitations unfairly, was not libellous *per se*, there being no charge that the plaintiff made that plea dishonestly. In the same case, a distinction is drawn between the speaking or writing the same words, and it is held that libel in such cases may lie, where slander will not.

*Slander of Title.*]—In *Linden v. Graham*, 1 Duer, 670, 11 L. O. 185, it was held, with reference to the cognate subject of Slander of Title, that it is essential, in these cases, to name the per-

sons who refused to loan or purchase in consequence of the act complained of, and that, if not, the complaint will be demurrable.

*Breach of Promise of Marriage, &c.*—In cases of breach of promise of marriage, the form of the old declaration in such cases may be substantially followed, with some few necessary abbreviations. See *Leopold v. Poppenheimer*, 1 C. R. 39. In relation to an action for seduction, see *Knight v. Wilcox*, 15 Barb. 279.

An action of the former nature sounds clearly in tort, and is not a debt within the meaning of the Homestead Exemption Act of 1850. *Newman v. Cook*, 11 L. O. 62.

*False Imprisonment.*—In actions for false imprisonment, the complaint must be confined to a simple pleading of the fact, according to the old practice; and any statements of the attendant circumstances, will, if objected to, be stricken out as frivolous. *Shaw v. Jayne*, 4 How. 119; 2 C. R. 69.

In relation to the powers of a justice in issuing a warrant upon slight cause, and the extent to which such warrant will afford protection to the parties acting under it, see *Wilson v. Robinson*, 6 How. 110, holding a strict, and *Campbell v. Ewalt*, 7 How. 399, a very liberal view of the question.

*Assault and Battery.*—In assault and battery, and other actions of a like nature, the old forms of declaration may also advantageously be consulted, with a view to framing the complaint in concise and legal language, of course pruning away all unnecessary repetitions.

In *Root v. Foster*, 9 How. 37, statements as to the intent of the defendant, and the ridicule brought upon the plaintiff by his conduct, were refused to be stricken out. Though not essential to entitle the plaintiff to sustain his action, they were material on the question of damages, and might be proved.

*Actions against Common Carrier.*—The first count of the former declaration in these cases has also been held to be a proper form of averment in a case of this nature, *Stockbridge Iron Company v. Mellen*, 5 How. 439, but the succeeding ones were there stricken out as redundant. In relation to a carrier's power to restrict his common law liability, see the recent case of *Moore v. Evans*, 14 Barb. 524.

## § 130. *Averments of Fact in special Cases continued.*

### 2. *Averments in Contract.*

*Suits on written Instruments, Performance of Conditions precedent.*—With reference to the numerous class of actions arising upon written instruments, or in which, in a general point of view, the performance of some condition precedent has to be pleaded, the provisions of the Code have been greatly extended by the amendments of 1851.

The section in reference thereto, sec. 162, now stands as follows:

§ 162. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts, showing such performance, but it may be stated generally, that the party duly performed all the conditions on his part; and, if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. In an action or defence, founded upon an instrument, for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party, a specified sum, which he claims.

The whole of the last section is new, and it seems obvious that this provision must be construed with considerable limitations. Taken by itself, and without reference to other provisions, or to general principles of law, it would seem to authorize a party, who founds his action upon a written instrument for payment of money only, simply to give a copy of that instrument, and to state what is due to him, and to do no more. According to this rule, if so carried out, a party suing on a policy of insurance, or the plaintiff in an action against an endorser or guarantor of a promissory note, need only give a copy of the instrument on which he makes his claim, without alleging, on the one hand, the loss claimed upon, or due presentment and due notice to the endorser or guarantor on the other; although, in the former case, the loss itself would form, in fact, the whole cause of action, and, in the latter, the facts thus left out are positive conditions precedent, essential to be performed, before the party sought to be charged is liable to be sued at all. It would be easy to multiply similar instances, but the two

above given will suffice to show that such a construction, if carried out to its full extent, would involve a practical absurdity, if not an utter impossibility in practice.

It seems obvious that the utmost limit to which the powers of this section can legitimately extend, is with reference to actions brought directly by the party in whose favor a written instrument is made, against the party making it: and this, only where the claim sued on arises solely under the terms of that instrument itself, without reference to external circumstances, or to the performance of external conditions. The provision in question appears, then, really to amount to little more than permission to the party pleading to give a copy of the instrument sued upon, instead of an abstract of its contents, a permission which practically existed before. It might possibly, indeed, be held as dispensing with the necessity of making the ordinary allegations as to the making and delivery of the instrument in question; but even with regard to these, the wisdom of omitting such allegations seems more than doubtful under any circumstances, or, at all events, until the courts have finally and decidedly pronounced on the true construction of the words employed. The clause then, when scrutinized closely, seems so wide and so loose, that, until its actual scope has been clearly and accurately defined, it would be unsafe to rely upon it in any case, or in any respect whatever; especially as the adoption of this course is, at the best, entirely optional, and the old established forms of allegation in such cases are in no manner impeached or abolished. It might even be contended that, instead of giving parties increased facilities of averment, it rather tends to diminish those they already possess, and to impose upon the pleader a sort of *quasi* necessity of giving a copy of the instrument sued upon in all cases, or rather, strictly speaking, to render this the more advisable course. The legislature, no doubt, meant to give increased facilities, but it seems somewhat questionable whether they may not, in fact, have imposed increased restrictions, to be observed, as a matter of prudence, at least, if no more.

*Bills or Notes—Observations on last Point.*]—The above observations have peculiar application to the different questions which have arisen, with respect to the proper form of averment in actions upon bills or promissory notes. Until the proper con-

struction of section 162 has been settled, and firmly settled by judicial construction, it would, in the writer's opinion, be a matter of the gravest imprudence to depart, in any essential particular, from the forms as now established, or to omit any one allegation which is now looked upon as essential, except in so far as it may now be looked upon as advisable, in some cases, to give an actual copy of the bill or note sued on, with all its endorsements.

In *Lord v. Cheesborough*, 4 Sandf. 696; 1 C. R. (N. S.) 322, principles are laid down in exact accordance with the views above stated. The complaint in that case was on a promissory note, and was framed in precise compliance with sec. 162, as now amended. There was, accordingly, no allegation that the plaintiffs were the holders or owners of the note there in question, or that the note was ever delivered to the plaintiffs, or to any one, by the defendants, or any thing, except the allegation that a specified sum was due to them on the note, which they claimed from the defendants. An answer, taking issue on the transfer and delivery of the note, and the ownership of the plaintiffs, and objecting to the complaint as not stating facts sufficient to constitute a cause of action, was refused to be stricken out as frivolous, and the complaint held to be defective, on the ground of the above omission; leave being given to amend. See also *The Bank of Geneva v. Gulick*, 8 How. 51; and the same doctrine had been previously shadowed out in *Ranney v. Smith*, 6 How. 420, in relation to the statement of a set-off of this description. In *Alder v. Bloomingdale*, 1 Duer, 601; 10 L. O. 363, such a complaint was held bad upon demurrer, it being held that, when not only the instrument itself, but extrinsic facts are necessary to be proved to enable the plaintiff to recover, the existence of those facts, as constituting part of the cause of action, must be averred on the complaint; demand of payment and notice of refusal being held to be facts of this description, as regards the endorser's liability.

On the other hand, the General Term of the First District have held, in *Roberts v. Morrison*, 11 L. O. 60, that, under the above circumstances, a complaint, merely giving a copy of the note and endorsement, was sufficient to charge an endorser.

The point, therefore, still remains unsettled by any dominant authority, and the cautions above given remain worthy of, at least, serious consideration, if no more.

*Endorser's Liability, Protest, Notice.*.]—The following decisions, made partly before, and partly after the insertion of the clause above noticed, have reference to the endorser's liability, and the proper mode of averment, in order to an action against him being duly sustained. Taken together, they constitute an additional inducement to act upon the doctrine laid down in the majority of the cases last cited, by taking, in all cases, the safer course of laying a sufficient basis in the allegations, for the unquestioned introduction of evidence of all the facts necessary to be proved for the above purposes.

In *Spellman v. Weider*, 5 How. 5, where a complaint had been made against both the maker and the endorser of a promissory note, the following rules were laid down by the court as necessary to sustain a proceeding of that nature: "The complaint, in order to conform to the Code, should state facts enough against the maker to show his liability to pay, and enough against the endorser to charge him with the debt. In the latter case, not only the making and endorsement of the note should be stated, but also the demand of the maker at the time and place prescribed for that purpose, and notice of such demand, and of non-payment, to the endorser." After going further into detail on the subject of these requisites, and showing various omissions in the complaint in these respects, the court said: "As against the maker, this was of no consequence; but, as the plaintiffs have chosen to unite both maker and endorser in the same action, their statement of facts should have been full enough to show the liability of both." Both parties having been irregular, the difficulty was there solved by a Rule allowing the plaintiffs to amend, and the defendants to put in a new answer or demurrer, without costs to either.

The details as to presentation and demand of payment, need not be specially set forth, in order to charge an endorser. It will be sufficient to allege that the note was "duly" presented, and payment "duly" demanded. The facts must, however, be proved, as of course, on the trial. *Gay v. Paine*, 5 How. 107; 3 C. R. 162.

A long discussion on the contract of endorsement, and on the subjects of protest and notice of dishonor, will be found at 9 L. O. 226, where the bill of exceptions, in a case of *Beals v. Peck*, is given in full, but no decision is reported. On the law of bills and notes, in general, see *Van Namee v. The Bank of Troy*, 5 How. 161.

In *The Montgomery County Bank v. Albany City Bank*, 8 Barb. 396, the law as to the due presentment of bills will be found fully laid down: the conclusion being, that presentment for payment is indispensable, in order to charge the endorser, but that presentment for acceptance is not absolutely necessary, though highly advisable. This decision has since been affirmed by the Court of Appeals, 30th Dec. 1852.

In *Walker v. The Bank of the State of New York*, 13 Barb. 636, it was held, however, that, where a bill had been presented for acceptance by the agent of the holders, and was not accepted according to its form and tenor, the agents should have treated the bill as dishonored, and given notice of non-acceptance to the endorsers; for which neglect, the endorsers were held to be discharged, and the agents liable to their principal; and this decision has been affirmed by the Court of Appeals, 18th April, 1854.

The endorser was also held, in *Kingsley v. Vernon*, 4 Sandf. 361, to be discharged, by false information given to him by the holder of the bill as to its having been paid, though such information proved to be erroneous, and was honestly given.

In *Cook v. Litchfield*, 5 Sandf. 330, 10 L. O. 330, since affirmed by the Court of Appeals, 31st Dec. 1853, as to the general principle; the subject of protest and endorsement are very fully considered, it being held, that mere formal omissions in the notice will not vitiate it, provided the facts stated contain all necessary information. It must contain such a description of the note as may enable the endorser to ascertain its identity, and must also communicate the fact of its dishonor. See likewise *Knopfel v. Senfert*, 11 L. O. 184. See also *The Cayuga County Bank v. Warden*, below cited.

Where, however, the notice admits of any doubt as to the note referred to, the reverse will be the case. Thus, on the affirmance of *Cook v. Litchfield*, by the Court of Appeals, above noticed, it was held that the notice of the first note there sued on was sufficient, though couched in general terms, no other note to which that notice could be applicable having at that time become due; but that the same form of notice was insufficient to charge the endorser, as to the other note there in question, there being, at the time when each became due, two or more notes in existence, to which the terms of that notice would equally apply. See notes of Court of Appeals, 31st Dec., 1853.

On the question as to how far a notary's certificate will or will



not be deemed conclusive as to the facts of presentment and notice, and the extent to which a presumption will lie in favor of its correctness, see *Burbank v. Beach*, 15 Barb. 326. The subject of protest will also be found fully considered in *The Cayuga County Bank v. Warden*, 2 Seld. 19. See same case, 1 Comst. 413. This case establishes also the principle above referred to, that where the notice is sufficient to convey information to the endorsers of the identity of the note, and that payment of it had, on due presentment, been neglected or refused by the maker, mere formal imperfections will not vitiate it. It also settles the point that the question is one of law for the court, and not of fact for the jury. See as to direction and service of notice of protest, *Morris v. Husson*, 4 Sandf. 93, affirmed by Court of Appeals, 21st April, 1853. In *Conro v. Port Henry Iron Company*, 12 Barb. 27, it is held that notice to the agent of a corporation, authorized to draw drafts on its account, is notice to the corporation.

In *Garvey v. Fowler*, 4 Sandf. 665, 10 L. O. 16, it was held that an averment in a complaint of due notice being given to an endorser, will be construed to mean notice in fact, and not notice by construction of law. When the plaintiff relies upon facts excusing notice in fact, he must set forth those facts in his complaint.

In *The Bank of Vergennes v. Cameron*, 7 Barb. 143, the question of the endorser's liability, and the necessary proof in such cases, will be found fully considered. See likewise, in relation to the endorser's liability in general, the decision in *Bowen v. Newell*, below cited under the head of Checks or Drafts.

*Averments in Actions on Notes generally considered.*—In *Appleby v. Elkins*, 2 Sandf. 673, 2 C. R. 80, it was held that, in an action by endorsee against maker, the following averments were sufficient:—1st. Making; 2d. Delivery; 3d. Endorsement to plaintiff; 4th. Non-payment; and, 5th. Indebtedness of defendant. See similar definition in *Giesson v. Giesson*, 1 C. R. (N. S.) 414; and a demurrer that the complaint did not aver that the plaintiff was lawful holder, or that the note was due, was there stricken out as frivolous, and leave to answer refused.

In *Loomis v. Dorshimer*, 8 How. 9, it was considered that an allegation that the payee of a note endorsed it, and that it was afterwards delivered to the plaintiff, was not sufficient; but the point was not expressly passed upon.

In *Taylor v. Corbière*, 8 How. 385, an averment to the above effect was sustained as good, and judgment given for the plaintiff. This case likewise disapproves of the decision in *Beach v. Gallup*, 2 C. R. 66, where an allegation that the plaintiff was "lawful holder" was held to be insufficient, standing alone; or rather, a demurrer on that ground was held not to be frivolous. His lawful ownership should, it was there held, have been averred.

In *Vanderpool v. Turbox*, 7 L. O. 150, it was considered that a specific allegation of endorsement is necessary, in all cases of action by an endorsee. A mere averment of lawful ownership will not, in such case, be sufficient, standing alone.

An omission to aver the fact of due protestation, in an action by endorsee against endorser, has likewise been held to be a demurrable defect. *Turner v. Comstock*, 1 C. R. 102; 7 L. O. 23.

Where a party signed a note as surety, his having done so ought to be specially averred. It was held in *Balcom v. Woodruff*, 7 Barb. 13, that a note of this description could not be given in evidence under the common money counts.

In an action by the payee against the maker of a note, a bare allegation that the defendant, by his note, promised to pay the sum sued for, and had not paid the same, but was indebted to the plaintiff therefor, was held to be sufficient, on demurrer that the delivery of the note, the date of payment, and the fact that the note was due, and that the plaintiff was owner and holder, ought to have been alleged. *Peets v. Brutt*, 6 Barb. 662. The complaint is, however, commented upon as being "very loose," and, of course, ought not to be taken as a precedent.

In *Hoxie v. Cushman*, 7 L. O. 149, it was held that the consideration given for a promissory note need not be specially averred in the complaint, especially where the payee had endorsed and put that note into circulation: and, in *Benson v. Cushman*, 1 C. R. 119, it was also decided that the words "for value received" import a consideration as between endorser and endorsee, and, coupled with the expression "lawful holder," show a sufficient cause of action.

In *James v. Chalmers*, 5 Sandf. 52, it is held that the presumption of law, that the holder of a note is its owner, is not repelled by showing that it came into his hands after it was due. Proof of a valuable consideration is only necessary, when a defence is set up, which would conclude the plaintiff, unless a purchaser for value and without notice.

And the purchaser of such a note, for a valuable consideration, before due, may maintain an action in his own name, without alleging an endorsement to him. *Billings v. Jane*, 11 Barb. 620.

The maker of a note wrongfully taken from him, and negotiated for value to a *bonâ fide* holder, may recover of the wrongdoer the value of that note, though still outstanding when the action is brought. *Decker v. Mathews*, 5 Sandf. 439.

With respect to the drawer, it was held, in *Hicks v. Hinde*, 9 Barb. 528, 6 How. 1, that it is competent for him to restrict his liability, in like manner as may be done by an endorser. The drawer, in that case, having signed as "agent," and the fact that he was so being known to all parties, he was held not to be personally bound. The previous cases on the subject are fully cited in the report. The same was held in *Conro v. Port Henry Iron Company*, 12 Barb. 27, affirmed by Court of Appeals, 18th April, 1854. See, also, *Walker v. Bank of the State of New York*, 13 Barb. 616.

In *Gardner v. Oliver Lee and Company's Bank*, 11 Barb. 558, where the payee of a bill of exchange had come in under the insolvency of the acceptor, and received a dividend out of his estate, whereby the latter was discharged from all liability, it was held that, by his taking that course, the drawer was exonerated.

In *Pratt v. Gulick*, 13 Barb. 297, it was held that an independent action could be maintained on a promissory note, unconditional on its face, though given originally as part of the terms of an uncompleted contract.

An instrument, informal on its face as a promissory note, as an order to pay for wheat in store at a certain price, may nevertheless be sued upon as a special agreement. *Lent v. Holzman*, 15 Barb. 274.

In *Conro v. The Port Henry Iron Company*, 12 Barb. 27, it is held that a corporation is liable upon a draft drawn or accepted by a party authorized for that purpose, though the corporate name be not mentioned in such draft, if it be drawn or accepted under a name adopted by the corporation: and that a subsequent ratification of the acts of an agent of that description, will be equivalent to an original authority.

In *Graves v. Friend*, 5 Sandf. 568, the taking a note on "account, without recourse," was held to be an absolute payment,

and that no action could be subsequently maintained on account of the indebtedness for which that note had been taken, the maker not having paid it. It was likewise held that parol evidence could not be received, to show that such taking was only conditional and not absolute.

*Sureties and Guaranties.*—Analogous to the question as to the liability on a bill or promissory note is that of sureties or guaranties on the same or similar instruments, and, therefore, the most convenient juncture at which to cite the recent cases on that point, will be the present.

In *Gardner v. Oliver Lee's Bank*, 11 Barb. 558, above cited, the acceptance of a dividend under the insolvency of the acceptor, was held to be sufficient to discharge the endorser, as before noticed. See likewise various cases in relation to the endorser's liability, cited under the previous head.

In *Mains v. Haight*, 14 Barb. 76, it was in like manner decided, with reference to a guaranty of a judgment being collectable, that due diligence in the attempt to collect it was a condition precedent to the guarantor's liability; unreasonable delay in issuing execution was held to be sufficient to effect a discharge of the latter, unless such delay be occasioned by his own acts, in which case he will still be liable.

In *Bigelow v. Benton*, 14 Barb. 123, it was held, on the same principle, that the terms of a guaranty must be strictly complied with, or the guarantor will not be bound. It is a claim "*strictissimi juris*." See to the same effect *Leeds v. Dunn*, Notes of Court of Appeals, 31st Dec., 1853.

In *Enos v. Thomas*, 4 How. 48, it was held that a contract, with a guaranty signed at its foot, might be considered as one instrument, and sued on as such. In *Brewster v. Silence*, however, 11 Barb. 144, it was held, on the contrary, that such a guaranty, endorsed on a promissory note, must be looked upon as a separate and distinct undertaking, though made for the same object, and will be void under the Statute of Frauds, unless a consideration be expressed upon it; and this decision has been affirmed by the Court of Appeals, 12th April, 1853. See, to the same effect, *De Ridder v. Schermuchorn*, 10 Barb. 638, in relation to a guaranty to fulfil an agreement.

Where a party signs as surety, a special averment to that effect should be made. See *Babrom v. Woodruff*, above cited.

A surety who pays the debt of his principal, is entitled to a full subrogation, and to every remedy which the creditor so paid off possessed, and, for this purpose, to an assignment of the original debt, and the securities for it; and also to the benefit of any judgment which may have been recovered. *Goodyear v. Watson*, 14 Barb. 481.

One of several sureties, who has paid the debt of the principal, may maintain an action against the others, for their proportional parts of the total amount, nor is parol proof admissible to qualify such liability. *Norton v. Coons*, 2 Seld. 33.

*Checks or Drafts.*]—Actions of this nature being in close analogy with those founded on a bill or promissory note, and being in many respects subject to the same general principles, come up next for consideration, in the natural order of arrangement.

The law as to certified checks is laid down in *Willeys v. The Phoenix Bank*, 11 L. O. 211, and it is held that the certifying a check is not a mere declaration of an existing fact, but creates a new and binding obligation on the part of the bank itself, and which is not destroyed, even by laches on the part of the holder. It is also held that a check, payable to the order of bills payable, is, in judgment of law, payable to the bearer.

In *Bowen v. Newell*, 5 Sandf. 326, it is held by the Superior Court that a written order upon a bank in another State, for payment of a sum of money, payable on a future day, is a check, and not a bill of exchange, and, as such, is not entitled to days of grace. It was also held that the *lex loci* governs, not only as to the time, but the mode of presentment; and, the order on that case being drawn on a bank in Connecticut, where no days of grace are allowed under similar circumstances, it was held that, the check having been presented and protested according to that law, the endorser was duly charged. The former conclusion has however been dissented from, and the decision has been reversed by the Court of Appeals; Notes of Court of Appeals, 12th April, 1853; and a new trial was ordered, and has been had. The Superior Court still adhere, however, to the second point, and a decision similar to the first has been again given, and affirmed at General Term, founded on the view above taken as to the *lex loci* being the governing rule. This view as to the *lex loci* seems to be supported by the case of

*Cook v. Litchfield*, 5 Sandf. 330, 10 L. O. 330, affirmed by the Court of Appeals, 31st December, 1853.

*Actions on Bonds.*—To this class of actions the amendment in sec. 152, above commented upon, may seem to be more generally applicable; and the complaint may, in such cases, be framed accordingly, simply averring the making of the bond, giving a copy, alleging non-payment, and claiming the amount due; though, even in these cases, the old form of alleging the making and effect of the bond, and its non-payment, seems to be fully adequate. Where, however, the condition of the bond is in any manner special, it would be most advisable to give a copy of the provision sued under; the general facts of the case, and also those of the non-performance of that condition, being clearly and distinctly averred.

*Policies of Insurance.*—Of an analogous nature to the above, are actions upon a policy of insurance, the precise form of complaint in which does not appear to have been made the subject of special adjudication. It is, however, easily deducible, by inference, from general principles. The making and delivery of the policy, and payment of the premium, should, in the first place, be averred. The substance of the policy itself should then be clearly and succinctly stated; or, if the question be one in which the proper construction of the general terms of the instrument, or of any particular clauses in it, are likely to be drawn into question, a copy of the whole document, or of the particular clauses in it, in respect of which the controversy arises, should be given; or, which will often be found a very convenient mode of averment, a copy of the policy may be annexed to the complaint, and referred to as forming part of it, the substance of it being shortly averred in the body. In marine cases, the facts of the voyage insured upon being in actual progress at the time of the loss, and, where the policy is an open policy, those necessary to show that the goods claimed upon were covered by the risk, must appear; and, in every instance, the facts of the loss must be distinctly and clearly, though succinctly, alleged. The giving of due notice of claim, and of due proof of loss and of interest, and also that the time allowed to the company for the payment of the risk has fully elapsed, must, in the last instance, be distinctly pleaded; the exact

wording of the provisions of the policy or conditions, being in these and all other respects strictly followed, in framing the necessary averments.

In *White v. The Hudson River Insurance Company*, 7 How. 341, it was held that, though a policy of insurance must state correctly what is insured, it is not necessary that the particular interest in the property, or the reason why the party insures, should also be expressed.

*Appeal Bonds.*—In *Teall v. Van Wyck*, 10 Barb. 376, it was held that an action was maintainable on a bond of this nature, though in strictness informal; the objection on that score not having been made when it was originally put in, but suffered to pass in silence.

An action on an appeal bond to the Court of Appeals cannot be maintained, where the appeal has been dismissed for want of prosecution, and not decided on the merits. Such a dismissal is not, in law, an affirmance of the judgment appealed from. *Watson v. Husson*, 1 Duer, 242.

### § 131. *Averments of Fact—Continued.*

*Replevin and Trover.*—The action under the Code for the claim and delivery of personal property is analogous, in all respects, to the old action of replevin. *Roberts v. Randel*, 3 Sandf. 707, 5 How. 327, 3 C. R. 190, 9 L. O. 144; *McCurdy v. Brown*, 1 Duer, 101.

In this class of actions, therefore, a direct and issuable averment must always be inserted, that the goods claimed are the property of the plaintiff. A mere allegation that he was entitled to the possession of those goods, and of facts affording evidence of ownership, will not, standing alone, be sufficient. *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217; reported on another point, 1 C. R. (N. S.) 169.

The property claimed must, too, be in the actual possession or control of the party sued, at the time when the action is brought, unless he has previously parted with that possession in a fraudulent manner. See *Roberts v. Randel*, 3 Sandf. 707, 5 How. 327, 3 C. R. 190, 9 L. O. 144, overruling *Van Neste v. Conover*, 5 How. 143, 8 Barb. 509, to the contrary effect.

The authority of *Roberts v. Randel* is fully confirmed by *Brockway v. Burnap*, 12 Barb. 347, 8 How. 188. The plaintiff can only recover upon a legal title; he must show an absolute or special property, giving him an immediate right to possession. The burden of proof, in this respect, lies upon him; and, if he fail, the defendant will be entitled to judgment, without proving the title set up in his answer. *McCurdy v. Brown*, 1 Duer, 101. A distinct allegation should, therefore, in all cases, be made, that the property is then in the defendant's possession; or, if he has parted with it, in fraud of the action, that point must be distinctly pleaded.

Similar principles are laid down, with reference to an action in the nature of trover, in *The Matteawan Company v. Bentley*, 13 Barb. 641. An action of this nature cannot be brought against a party not guilty of an actual conversion, and who has never had possession of the property, but merely claims a lien upon it.

The pleader must, of course, take care that his prayer corresponds with his statement. If he demand judgment for the value of the property, or damages for its conversion, he cannot proceed to recover the property itself in replevin. The remedies are incompatible, and cannot be joined; and the nature of the relief demanded in the prayer of the complaint, will determine the class of the action. See *Maxwell v. Farnam*, 7 How. 236; *Spalding v. Spalding*, 3 How. 297, 1 C. R. 64; *Dows v. Green*, 3 How. 377; and other cases, before cited, under the head of Misjoinder of Causes of Action.

*Goods sold, &c.*—Forms will be found in the Appendix, for the complaint, in cases of goods sold and delivered, and work and labor done. In the former case, allegations of sale and delivery will be sufficient; a promise to pay will be implied, and need not be pleaded in form. See *Glenny v. Hitchens*, 4 How. 98, 2 C. R. 56; *Tucker v. Rushton*, 2 C. R. 59, 7 L. O. 315; and *Nesfus v. Kloppenburgh*, 2 C. R. 76, above referred to. The word "due," as used in a complaint of this nature, imports, not merely indebtedness, but that the time when payment should have been made has elapsed, and will be sufficient to sustain the action. *Allen v. Patterson*, Court of Appeals, 30th December, 1852. Where, too, a sale has been made to an agent, it should be averred as one to the principal. *Dollner v. Gibson*, before



cited. On the form of the complaint for work and labor, no question as yet seems to have arisen. In cases of the above nature, a copy of the account alleged need not, as before referred to, be stated at length in the complaint. It will be sufficient, if the plaintiff afterwards deliver a verified copy to the defendant, in the manner prescribed by sec. 158 of the Code.

*General Remarks.*—Of course, the above remarks, though embracing many, do not profess to include, still less to give forms for every species of complaint, which will be necessary in practice. The same general principles, however, apply to all, and all must now be framed upon the same model, *mutatis mutandis*.

The foregoing observations have more peculiar reference to actions, where the relief demanded would, under the old system, have been more peculiarly of common law cognizance. The class of equitable actions, if they may so be termed, remains to be noticed, and likewise those with reference to real estate, which will be separately treated.

### § 132. *Averments of Fact—Continued.*

*Equitable Actions—Averments in General.*—The considerations with respect to the general form of averment in these cases, have already been most fully entered upon, and the cases fully cited, in chapter I. of the last division of this work. The safest guide which can be taken with reference to the averments of this nature, will, perhaps, be a well-drawn bill in chancery under the old practice: carefully retrenching, in the process of adapting that form to the present requisites, every verbal surplusage, and every merely probative allegation. Thus framed, the complaint will conform to the law, as laid down by a large majority of the cases above referred to, and particularly in *Howard v. Tiffany*, 3 Sandf. 695, 1 C. R. (N. S.) 99; *Coit v. Coit*, 6 How. 53; *Minor v. Terry*, 6 How. 208, 1 C. R. (N. S.) 384; and *Getty v. The Hudson River Railroad Company*, 6 How. 269, 10 L. O. 85.

*Creditor's Bill.*—The old proceeding by a creditor's bill, remains, in effect, unchanged; but such proceeding must be brought in the ordinary form of a complaint under the Code, and not according to the former practice. *Rogers v. Hern*, 2 C. R. 79.

Before a creditor's bill can be filed, it is essential that execution should have been issued into every county in which any one of the defendants resides, and returned unsatisfied, and also into every county in which they, or any of them, own real estate; a transcript of the plaintiff's judgment being previously filed in each such county, in order to render the execution effectual: and the facts should be alleged accordingly—*Millard v. Shaw*, 4 How. 137; but, if the defendant have consented to waive any of the above prerequisites, a simple allegation of that consent will be sufficient, without giving all the details.

An action of this nature is maintainable, upon an execution issued, and returned unsatisfied, before the passing of the Code, without special leave of the court. It is not, in its nature, an action upon a judgment, but rather a supplementary proceeding, for the purpose of carrying that judgment into effect. *Dunham v. Nicholson*, 2 Sandf. 636.

Nor are the special provisions of the Code, in relation to supplementary proceedings, a bar to the assertion of this description of remedy, for the purpose of obtaining specific equitable relief. *Goodyear v. Betts*, 7 How. 187.

The provisions of the Revised Statutes, (see 2 R. S. 173,) made it a condition precedent to a proceeding of this nature, that the plaintiff should have an equitable interest, to the value of \$100. In *Quick v. Keeler*, 2 Sandf. 231, it is held that this restriction is superseded by the Code, and that any creditor may now take that measure, on complying with its provisions, and with those of the Revised Statutes upon the subject. In *Shepard v. Walker*, 7 How. 46, the contrary conclusion is come to. The question, therefore, remains unsettled by positive authority, though the more liberal view appears preferable.

In *Tripp v. Childs*, 14 Barb. 85, it was held that this description of remedy was obtainable by a judgment creditor, with a view to enforce a claim against his debtor's future earnings, and to avoid an agreement entered into for the purpose of depriving the creditors of that benefit.

In *Conroe v. Port Henry Iron Company*, 12 Barb. 27, it was held that different creditors of a corporation, having a common interest in the relief sought, may properly unite in a proceeding of this nature. In the same case, the doctrine of multifariousness will be found fully considered, both generally and with relation to this class of suits in particular.

A creditor at large, cannot maintain an action to set aside an assignment as void and fraudulent. The rule that such an action can only be brought by a judgment creditor, has not been altered by the Code. *Neustadt v. Joel*, 12 L. O. 148.

In *Hazard v. McFarland*, Court of Appeals, 18th April, 1854, a personal decree, against creditors at large, who had unduly obtained possession of goods belonging to the debtor, and were, therefore, charged with their value as trustees for the payment of creditors, was affirmed in a suit of this kind, instituted by one of the latter class.

The subject of proceedings of this kind will be found more fully entered upon in a subsequent chapter, under the head of Supplementary Proceedings.

*Injunction.*—With reference to injunction, a distinction may probably be drawn between those cases where that remedy is the main object of the suit, and others where it is merely sought collaterally. Where the latter is the case, it may well be contended that the insertion of matter, bearing solely upon that injunction, as a collateral remedy, and not going to the establishment of the main cause of action, is, *pro tanto*, irrelevant, and ought not to appear on the pleadings at all, but to be substantiated by separate affidavit, according to the principles laid down in *Putnam v. Putnam*, 2 C. R. 64; *Milliken v. Carey*, 5 How. 272; 3 C. R. 250; and other cases to the same effect, before cited. Where, however, the granting of an injunction forms either the sole object of the suit, or a substantial part of the relief expressly sought in it, it would seem that this cannot be so; and, in cases of this description, averments of the facts, showing the plaintiff's right to that remedy, seem not merely advisable, but, in some instances, even indispensable. See, to this effect, *Howard v. Tiffany*, and *Minor v. Terry*, before referred to. The subject of injunction in general, involving of necessity the question of the proper averments in such cases, has been already considered.

*Partnership Accounts.*—A complaint of this nature, setting forth a partnership, a dissolution, the existence of unsettled accounts, and a balance in favor of the plaintiff, is *prima facie* good, as showing a sufficient cause of action. *Ludington v. Tuft*, 10 Barb. 447.

A suit of this nature is maintainable in respect of a special partnership, as well after as before the dissolution of that relation. *Hogg v. Ellis*, 8 How. 473.

Where one partner had made an assignment, it was held that creditors claiming under it were indispensable parties to a suit by the other for an account. *Johnson v. Snyder*, 8 How. 498.

*Specific Performance.*—As a general rule, the specific performance of the contract of an adult for personal services, will not be enforced. *Haight v. Badgeley*, 15 Barb. 499.

The contract of a married woman, having power to dispose of property, under an ante-nuptial contract, made prior to the law of 1848, is binding, and may be enforced against a purchaser, by her assignee. *Van Allen v. Humphrey*, 15 Barb. 555.

The rule with regard to the extent of the vendor's duty to disclose material facts in relation to the subject-matter of the contract, will be found fully considered in *Bench v. Sheldon*, 14 Barb. 66.

A parol contract, void by the Statute of Frauds, cannot be enforced in a direct action for that purpose; though, if the vendor have fully performed his part, he may recover the balance of the purchase-money. *Thomas v. Dickinson*, 14 Barb. 90.

In relation to the extent to which an offer, made by mail, is binding, and may be enforced as a contract, if accepted by the opposite party, see *Vassar v. Camp*, 14 Barb. 341.

The rule of law that, where one party designs to rescind a contract, he must do whatever is necessary to restore the other to his original condition, in respect to the thing sold and the consideration paid, and that, before suit; and, also, that he cannot affirm in part and rescind in part, will be found fully considered in *The Matleawan Company v. Bentley*, 13 Barb. 641. This rule is, however, inapplicable to a case where the vendor has performed his part of an invalid contract, and sues for the balance of purchase-money. It holds good in relation to valid contracts only. See *Thomas v. Dickinson*, 14 Barb. 90, before cited.

*Divorce.*—A complaint for divorce on the ground of adultery will be insufficient, where it contains no specification of the person with whom, or the place where the offence was committed. If the former be unknown, the latter should be specified.

ally stated, *Heyde v. Heyde*, 4 Sandf. 692. The same principle as to the necessity of giving a full and definite statement in relation to the acts complained of is equally applicable to cases where separation only is sought; the elements of time, place, and circumstances, must be equally borne in mind, in framing allegations under these circumstances.

Where the husband is plaintiff, he cannot proceed, after the service of the summons, until a next friend has been appointed for the wife. If she neglect to apply, it will be competent for him to do so. *Meldora v. Meldora*, 4 Sandf. 721.

*General Remark.*]—The Code and Rules make no special provision, with reference to the proper form of complaint in actions of an equitable nature; nor do the decided cases lay down any positive rules on the subject, with the exception of the few points adverted to. Under these circumstances, the remark before made holds good, that, in this class of cases, a well-drawn bill in chancery, under the old practice, will form the safest guide, with the retrenchments and precautions before alluded to. The exact provisions of any instrument, sought to be either specifically enforced, or duly interpreted, should be set forth in all cases; *verbatim*, where those provisions are either short or special; or else, with sufficient detail and certainty to enable the court to arrive at the exact facts in controversy, from the pleadings themselves, without the necessity of having recourse to statements out of the record.

### § 133. *Averments of Fact, continued: Real Estate Cases.*

The proper form of complaint, in those cases having peculiar reference to real estate, or to matters arising out of it, remains to be treated of, before quitting the subject of the proper averments in complaint, separately considered.

In most instances, remedies of this nature are matters specially provided for by the Revised Statutes; and, at first, doubts were entertained as to whether this class of actions could be brought at all under the Code. See *Traver v. Traver*, 3 How. 351, 1 C. R. 112. The contrary, however, has been settled by the following series of decisions:—*Watson v. Brigham*, 3 How. 290, 1 C. R. 67; *Backus v. Stilwell*, 3 How. 318, 1 C. R. 70; *Myers v. Rasback*, 4 How. 83, 2 C. R. 13; *Row v.*

*Row*, 4 How. 133; *Townsend v. Townsend*, 2 Sandf. 711; *Reed v. Child*, 4 How. 125, 2 C. R. 69; *Hammersley v. Hammersley*, 7 L. O. 127; *Vanderwerker v. Vanderwerker*, 7 Barb. 221. These authorities establish, beyond a doubt, that, in all cases where, under the old practice, a party was at liberty to proceed, either at equity, or by petition, or otherwise under the special provisions of the Revised Statutes, he has still the same option; an action under the regular forms of the Code being substituted for the former bill in equity in such cases.

In all real property actions, brought under the Code, the law of the case is to be governed by the Revised Statutes, the practice by the present mode of procedure. The saving of the former is effected by sec. 455 of the present measure, as follows:

§ 455. The general provisions of the Revised Statutes relating to actions concerning real property, shall apply to actions brought under this act, according to the subject-matter of the action, and without regard to its form.

*Ejectment.*—The first proceeding to be considered, is the action under the Code, which stands in place of ejectment under the old practice. At 1 C. R. 19, will be found an essay on this subject. The conclusion is clear, *i. e.*, that all the old formalities on the subject are entirely swept away, and that the action must hereafter be conducted in strict accordance with the new practice, the remedy for mesne profits being joined in the same proceeding.

The old practice of proceeding against the tenant alone is swept away by the recent alterations; and, as a general rule, it will be proper to join, as defendants, all persons having an interest in the property, which will be affected by a recovery. *Wablorph v. Bortle*, 4 How. 358; *Townsend v. Townsend*, 2 Sandf. 711; *Fosgate v. Herkimer Manuf. and Hydr. Company*, 12 Barb. 352. This is however not strictly necessary, though generally proper, with regard to persons not in possession of the premises, though claiming an interest therein. *Van Buren v. Cockburn*, 14 Barb. 118.

A joint action of this nature brought by the wife, owner of the fee, and the husband, as tenant by the curtesy initiate, was sustained in *Ingraham v. Bibbwin*, 12 Barb. 9; affirmed by the Court of Appeals, 7th Oct., 1853. See, likewise, *Ripple*

v. *Gilborn*, 8 How. 456, below cited, under the head of Partition, as to an inchoate right of dower.

Ejectment to recover dower will lie against a tenant for an estate less than freehold, and before dower has been assigned, or admeasured; provision being made in the judgment record, for the appointment of commissioners to admeasure, as regards the lands in the possession of the defendant. *Ellicott v. Mosier*, 11 Barb. 574. The acceptance of an assignment of rents, will not bar the widow, unless it appear they will endure for her life.

The rule that the plaintiff in ejectment is bound to strict proof of his title, holds good under the new as under the old practice. *Fosgate v. Herkimer Man. and Hyd. Company*, 12 Barb. 352.

In order to ground a recovery for mesne rents and profits, as well as for the land itself, the joinder of which causes of action is now allowable, the complaint, in addition to the allegations necessary to sustain a strict ejectment, should also contain, in substance, the same allegations which the Revised Statutes required to be inserted in the suggestion for recovery of mesne profits. *Livingston v. Turner*, 12 Barb. 481. If omitted, the recovery on that ground will be barred, in that particular proceeding, though it seems that it is still competent for the plaintiff to bring a separate action, as heretofore.

In *Tompkins v. White*, 8 How. 520, it was held, that a claim against one of two defendants, seeking to recover moneys alleged to have been received by him on account of rents of a joint estate, without specifying any particulars, could not be joined with a cause of action in ejectment, for the recovery of the estate itself, against both; and a demurrer was allowed on that ground. They were not shown to be "mesne profits."

The form of a complaint, under the new practice, will be found in the Appendix. The plaintiff should, of course, make a distinct and positive averment as to his title, and will have to prove it at the trial, as formerly, unless admitted or not denied by the answer. On this account it would be well, in all cases, to make that averment as specific as possible; and so to frame it, as that an admission or non-denial of it by the defendant, will amount to an admission of the whole case. The points above noticed as to the recovery of mesne profits should also be carefully looked to. The plaintiff can only recover "*secun-*

*dum allegata*," and will be bound to strict proof in all cases. See *Fosgate v. Herkimer Manufacturing and Hydraulic Company*, and *Livingston v. Tanner*, above cited.

The subject of the notices which are requisite, on the commencement of this and other real estate actions, will be found treated of at the end of the present chapter.

*Partition.*—The next real estate action to be mentioned is that for partition of an estate—a proceeding of a peculiarly special and important nature. Precisely the same provision on this subject as that above cited with reference to real actions in general, is effected by sec. 448. The law in partition cases is still to be sought for in the Revised Statutes; the practice, in all cases where the proceeding is by action, is to be governed by the Code. The form of a complaint in partition, will be found in the Appendix.

Every party directly or indirectly interested in the *corpus* of the estate itself which is sought to be divided, at the time when the action is brought, must, of necessity, be joined; except encumbrancers, who may or may not be so, at the plaintiff's election.

Parties, however, who have parted with their title before the action is commenced, need not, and cannot be joined; and, if they are, the proceeding so taken cannot properly be sustained. *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

In *Bogardus v. Parker*, 7 How. 305, it was held, that a question as to the claim of a defendant to a specific lien on the estate itself, might properly be raised by the complaint in a suit of this nature, and an account prayed for and taken in respect of such claim.

In *Brownson v. Gifford*, 8 How. 389, it was held, that the husband of the married woman, entitled to a separate estate in the premises sought to be partitioned, could not properly be joined with her as plaintiff. An executor and trustee, as such, but who had not qualified, was also held to have been unnecessarily joined as defendant. The wife of another defendant entitled to an interest, was held to have been properly joined in respect of her inchoate right of dower: and many other points in relation to parties in this form of action, will be found considered in the report.

In *Ripple v. Gilborn*, 8 How. 456, the wife of a plaintiff was



held to be a proper and necessary party as co-plaintiff, in respect of her inchoate right of dower. See, also, *Ingraham v. Baldwin*, above cited under the head of Ejectment, in relation to the interest of a husband, as tenant by the curtesy initiate.

The plaintiff in this form of suit must be in actual or constructive possession of his undivided share; and, therefore, when the complaint shows that the legal title is in a third person, as trustee, the defect will be fatal. *Stryker v. Lynch*, 11 L. O. 116. In the same case it was held that it is not sufficient, in this proceeding, to allege that a defendant claims some adverse interest, and is therefore a proper party. The rule that adverse titles are not to be tried in partition is not changed by the Code, and the nature of every claim against the estate must, of necessity, be stated.

The complaint in partition must state, distinctly and accurately, the exact circumstances in relation to the interests of all parties; and, where those interests are derived under any peculiar or doubtful provision, it will be far better to set forth that provision *verbatim*, instead of merely abstracting it: which may be done with reference to instruments or circumstances of an ordinary nature.

Although every necessary party must be joined in a suit of this description, and it will often be expedient to make encumbrancers defendants, with a view to the due adjustment and apportionment of their charges, the plaintiff, in the latter case, should, if possible, obtain the consent of the other parties to such introduction; for, if he be held to have made it unnecessarily, he will otherwise be liable for the additional costs; *Hammersley v. Hammersley*, 7 L. O. 127.

*Admeasurement of Dower.*—Of a very similar nature to partition, is an action brought by a widow for the admeasurement of her dower. Relief of this nature was granted by the Superior Court, in *Townsend v. Townsend*, 2 Sandf. 711, and, objections having been taken that the defendants were not then in actual possession of the lands there in question, and also that the action was brought within six months after the husband's death, those objections were overruled.

The widow's right to this peculiar remedy, does not however preclude her from maintaining ejectment against a tenant, before her dower has been assigned or admeasured, though,

in a judgment taken by her under such circumstances, provision will be made for the latter purpose. See *Ellicott v. Mosier*, before cited under the head of Ejectment.

The complaint in this case, should contain a full description of the land on which the dower attaches, with definite and positive averments of the husband's seisin and death, and of the widow's right to dower; and, also, that such right has not been barred, either by express provision made for her, or release or consent on her part; or, if she have exercised her election between her dower and a provision made for her, that election should be specially pleaded. The prayer for relief should be in precise analogy to that given in the form of complaint in partition, "*mutatis mutandis*."

By the recent amendment in sec. 307, a previous demand and refusal is made a necessary condition precedent to an action of this nature, as far as regards the recovery of costs, which cannot otherwise be claimed.

*Nuisance and Waste.*—The former action of waste, and writ of nuisance, are abolished by sections 450 and 453. The proper form of proceeding in these cases, is now by an action for relief and damages, under the present forms. In waste, the relief demanded may include forfeiture of the estate of the party offending, and eviction from the premises; and, by section 451, the law in those cases, as laid down in the Revised Statutes, irrespective of the provisions which prescribe the form of the action to be brought, is specially saved. A limitation is, however, imposed by sec. 452, on the remedy of forfeiture and eviction, which cannot be obtained, unless the injury to the reversion shall be adjudged to be equal to the value of the tenant's estate, or to have been done in malice. A distinct averment to this effect should, therefore, be inserted in the complaint, in all cases where relief of this nature is sought, in order to ground the introduction of evidence upon the subject. In *Linden v. Hepburn*, 3 Sandf. 668, 3 C. R. 165, 9 L. O. 80, 5 How. 183, where the plaintiff sought a judgment of this nature in connection with equitable relief, it was held that he could not obtain both in the same proceeding, but must be put to his election. The complaint should, therefore, under similar circumstances, be framed accordingly. Of course, the nature of the waste complained of, and the title of the party seeking

the remedy, must be distinctly and positively stated, in order to ground the right to any relief at all. And, in an action for a nuisance, the nature and extent of the act complained of, and of the injury resulting therefrom to the plaintiffs, must also be clearly and positively averred; in order at once to ground a claim for adequate damages, and also for the guidance of the court, in making a proper order for its cessation or removal.

*Determination of Claims.*—By section 449, it is provided that proceedings to compel the determination of claims upon real property, under the provisions of the Revised Statutes, (2 R. S. 313,) may be prosecuted by action under the Code. The very nature, however, of these proceedings, commencing as they do with the service of a special notice, and carried on, as they are, in a manner totally inconsistent with the ordinary forms of an action, seems to render this impossible in practice, and it was accordingly so held in *Crane v. Sawyer*, 5 How. 372; 1 C. R. (N. S.) 30. The remedy, therefore, in these cases, seems to be exclusively under the forms of the Revised Statutes, and not to be otherwise obtainable. In *Stryker v. Lynch*, 11 L. O. 116, above cited, there is an "*obiter dictum*," that this remedy is obtainable by an action; but the reasoning in *Crane v. Sawyer* seems unanswerable.

By the recent statute, Laws of 1854, c. 116, p. 276, the powers in this respect, conferred by the Revised Statutes, in relation to proceedings taken by individual claimants, are extended to corporations, so far as they can be applied, and bodies of that nature are, accordingly, authorized to proceed in the same manner; it being made a prerequisite, that the notice required by the Revised Statutes should be subscribed with the name and place of residence of the agent or attorney of the corporation seeking such relief.

This provision affords strong corroboration of the correctness of the view taken in *Crane v. Sawyer*, as above noticed; the proceeding under the forms of the Revised Statutes being, not merely recognized, but in part prescribed.

*Foreclosure.*—The last proceeding of the above nature is that of foreclosure. A form of complaint in this proceeding is given in the Appendix.

It is essential that the nature of the security, its due record, and the defendant's failure to pay the amount of principal and interest, should be distinctly averred, and a full description of the premises must be given, in order to form an adequate ground for the relief to be obtained on the decree. See Rule 46 and 47 of the Supreme Court.

Every junior encumbrancer, known at the time of the bill, should be made a party, and, for this purpose, the records should be carefully searched; if not, the whole proceeding will be nugatory, as far as regards the rights of the parties omitted. The wife of the party entitled to the equity of redemption, and also the widow of any deceased party so entitled, must also be joined, or the decree will be of no force *pro tanto*. *Denton v. Nanny*, 8 Barb. 618. Where, too, a widow had actually been made a party in another capacity, no issue being raised as to her right of dower, and, in that capacity, suffered judgment to be taken against her *pro confesso*, her right to dower was held not to be affected. Her claim in that respect was paramount to the mortgage, and, therefore, she had no right to suppose that that claim would be called into question, whatever might be the case as regarded her subsequent interest. *Lewis v. Smith*, 11 Barb. 151, 7 L. O. 292; affirmed by Court of Appeals, 18th April, 1854; 12 L. O. 193.

In no case are senior encumbrancers necessary parties, and it would seem from the last case, that they are not even proper ones, unless for the purpose of ascertaining the amount of their incumbrances, in order that the same may be duly provided for on a sale taking place. They cannot be made parties, for the purpose of contesting the validity of their prior claims. See likewise *Corning v. Smith*, 2 Seld. 82, and cases there cited.

In the city of New York, a mortgagee acquires a right to redeem the premises, as soon as they are assessed for city purposes. By such payment he acquires a lien on the premises, which he may add to his mortgage debt, and collect by foreclosure. *Beevort v. Randolph*, 7 How. 398.

In framing the complaint in foreclosure, care must be taken to set out the conditions of repayment, as contained in the mortgage itself, and not merely by reference to the bond; or the defendant may tender an issue on the point, and delay the entry of judgment. *Dimon v. Bridges*, 8 How. 16.

Where infants are interested in the estate sought to be fore-

closed, the nature of their interest, and whether it is paramount or subordinate to that of the plaintiff, must be shown by specific allegation. The ordinary allegation, that such infants claim some interest in the premises, is not sufficient, as the facts cannot be taken as admitted as against them, and there must be some averment to sustain the requisite proof. *Aldrich v. Lapham*, 6 How. 129, 1 C. R. (N. S.) 408.

It seems that a plaintiff is not required to allege or to establish beforehand, and in the first instance, any claims he may have upon the mortgaged premises, independent of the mortgage he seeks to enforce. He has the same right as any other person, to present and establish a claim to the surplus moneys after sale; and, if necessary, his complaint may then be amended, on an application made after that surplus has been ascertained. *Field v. Hawxhurst*, 9 How. 75.

The above points must, of course, be carefully borne in mind in preparing the complaint in cases of this nature; and, in general, where any party is interested in more than one capacity, care must be taken to frame the statements so comprehensively, as to include every possible interest which such party may possess. Of course, too, any peculiar circumstances connected with the security, as, for instance, if the mortgagee have been in possession, must be distinctly averred; and, in the latter case, the results of any accounts between the parties, which will tend to show the exact sum then due in respect of the security, must be correctly stated; and it may be expedient to annex copies of the accounts themselves to the complaint, with a view to obtain an admission or non-denial of their correctness. The observation made in a previous part of the chapter, with regard to fixing the venue in these cases, will have been noticed. It must be in the county, or one of the counties, where the premises are situate, irrespective of that in which the loan itself may have been actually transacted.

### § 134. *Prayer for Relief.*

The long and complicated question, as to the proper averments in the different forms of complaint, having thus been disposed of, we arrive, in the third place, at a subject of even greater importance, though not of equal complexity, *i. e.*, the proper demand of the relief sought for. The observations on

this subject have, however, been in a great measure anticipated, by the considerations upon sec. 167, stated at the outset of the chapter. It has there been shown, that the nature of the action will be determined by this part of the complaint; and that, however the statements in the body of the pleading may show a title to any peculiar species of relief, apart from that formally demanded, the relief so omitted to be asked for cannot be obtained. See, especially, *Spalding v. Spalding*, 3 How. 297, 1 C. R. 64; *Dows v. Green*, 3 How. 377; *Chapman v. Webb*, 6 How. 390, 1 C. R. (N. S.) 388; *Otis v. Sill*, 8 Barb. 102; *Cuhoon v. The Bank of Utica*, 4 How. 423, 3 C. R. 110; *Rodgers v. Rodgers*, 11 Barb. 595, before cited. In *The Commercial Bank v. White*, 3 How. 292, 1 C. R. 68, it was considered that alternative relief could not be demanded in respect of the same transaction, where the two forms of relief asked for fall under two distinct classes of the actions enumerated in sec. 167, incapable of being joined under the provisions of that section.

The proper classification of the action is, therefore, above all, most important to be attended to by the pleader, in framing his prayer, where there is either any doubt as to the exact remedy obtainable, or where any election has to be made between different forms of remedy, obtainable under the same state of circumstances. In this latter case, above all, the most careful exercise of judgment will be found necessary. Objections of this nature fall, however, more peculiarly under the head of Demurrer, and, therefore, it would be premature to enumerate them here in detail. In the chapter devoted to that branch of pleading, the subject in general, and the decisions in reference thereto, will be found fully entered upon.

Where a simple money recovery is sought, the demand of judgment for the amount claimed, with interest from the date of the original claim, or last settlement of account, is all that is necessary. In actions where pecuniary damages are alone asked for, unaccompanied by other relief, the form is even simpler, the demand of interest being, of course, incompatible; where, however, as in actions in respect of waste or nuisance, relief is required, as well as damages, it must not be forgotten to be asked for.

It is in actions for relief, as such, that the exercise of ingenuity and thought will, above all, be required, as regards this portion of the complaint, on the due framing of which every

thing will, in fact, depend. Every possible remedy which the court may have in its power to grant, under the peculiar circumstances, should, therefore, be carefully pondered over, and every one of those remedies should be distinctly and in terms asked for; unless, under the circumstances of the case, it be thought better to waive them in any respect. Injunction, in particular, cannot be granted at all, in respect of facts existent at the date of the complaint, unless that remedy be specially prayed for; and, where the appointment of a receiver is part of the relief sought before, or as part of the judgment, a demand to that effect must also be inserted. In actions for the recovery of real or specific personal property, it must not be forgotten, that a claim for damages for withholding, and also, in the former case, a claim for mesne profits, is, in all cases, compatible with a claim for the recovery of the property itself; and a prayer to this effect should always, as a general rule, be subjoined to the main relief demanded. In fact, every species of relief which is or may be required, should be asked for specifically and in terms; and, in no case, should the usual concluding clause, praying "for such further or other relief as the court may direct," be omitted on any account. This last demand should not, however, be overweeningly relied on. See *Marquat v. Marquat*, 7 How. 417. It is most essential, nay, vital, with reference to matters subsidiary to the main demand of the plaintiff; but, in respect of those which embrace any thing in the nature of a separate and independent claim, it may, in most cases, be ineffectual, standing alone, and without any specific demand whatever.

The pleader must, however, take special care that, in praying relief, he does not ask for any that is inconsistent. Thus, in *Linden v. Hepburn*, 3 Sandf. 668, 5 How. 188, 9 L. O. 80, 3 C. R. 165, where the plaintiff sought to enforce a forfeiture, and also to obtain equitable relief, in respect of the same transaction, it was held that he could not ask for both conjointly, but must make his election between the two species of remedy.

See, also, as to alternative relief of an inconsistent nature, the cases cited at the outset of this chapter, in reference to sec. 167.

Where, however, the plaintiff is entitled to both legal and equitable relief under the facts averred, and such relief is not inconsistent in its several parts, he may obtain it by means of

the same proceeding, and it should be prayed for accordingly. *Linden v. Hepburn*, above cited; *Getty v. The Hudson River Railroad Company*, 6 How. 269, 10 L. O. 85.

It would seem from the case of *Beale v. Hayes*, 5 Sandf. 640; 10 L. O. 166, that the claim of judgment for a larger amount than, by the plaintiff's own showing, he is entitled to recover, will not constitute a demurrable defect. Of course the error is one that, though not fatal, it will always be expedient to avoid.

### § 135. *Service, and other Formalities.*

*Service.*] — The general requisites of complaint, separately considered, having thus been gone through, it remains to notice the proceedings necessary for its due completion and service. This branch of the subject has, however, in a great measure, been anticipated, in the chapter as to the formal requisites of pleading. The manner in which the complaint, when prepared, must be copied, subscribed, and verified, is there fully prescribed; and it would be superfluous to enter a second time upon the same details. The only remark necessary is, that the strictest compliance with the directions there given, is virtually essential. The new Rule, No. 87, that distinct causes of action should not only be separately stated, but plainly numbered, should also be carefully attended to.

The complaint having been perfected, a copy of it must be served upon the opposite party, either personally, as annexed to the summons, or on him or his attorney afterwards, if he give regular notice of appearance, and demand a copy. The mode of service, in this latter case, differs in no respect from that of ordinary papers in the suit, and will be found prescribed in the chapter devoted to the consideration of those subjects. The proceedings to be taken by the defendant for that purpose, the time within which the copy so demanded by him must be served, and the consequences to the plaintiff if he omit to do so, will be found fully detailed in the succeeding chapter. The questions as to where it may, or may not, be expedient to serve a copy of the complaint in company with the summons, have also been before enlarged upon, in the chapter devoted to the consideration of that proceeding. As a general rule, it will be advisable in all cases, for the obvious reason, that an omission to do so will enable the defendant, as of course, to obtain additional



time to answer. Where, however, the defendants are numerous, and are likely to appear in classes, and more than one by the same attorney, service of the summons alone will usually be the more convenient course; and, when the service is by publication, that is the only advisable mode.

Where a copy of the complaint is demanded, the plaintiff must serve it within due time, or the defendants' attorney will not be bound to accept it, and will be entitled to move to dismiss. *Baker v. Curtis*, 7 How. 478; *Mandeville v. Winne*, 5 How. 461; 1 C. R. (N. S.) 161; there cited. The name of the court should, on no account, be omitted. *Yates v. Blodgett*, 8 How. 278. The fixing the venue, where the action is brought in the Supreme Court, is also of equal importance. See *supra*.

In cases where service by mail is admissible, the plaintiff will, of course, be entitled to serve his complaint in that manner, after demand made, but within twenty, not forty days, unless the demand itself be served by mail. In that case, the forty days would probably be held allowable, though, until the matter be settled by judicial decision on the actual point, it would perhaps be unsafe, and certainly inexpedient, unless under peculiar circumstances, to risk the chance. The general principle has, however, been laid down as above with reference to a notice of appeal, in *Dorlan v. Lewis*, 7 How. 132, where it is held that, when the service by one party has the effect of setting time to run as against the other, the time allowed shall be governed by the mode of the original service. Of course, where an early answer is an object, it will be inexpedient to serve the complaint in this manner. See this subject hereafter considered with reference to the time allowed to answer.

In *Travis v. Tobias*, 7 How. 90, it was considered that, in actions founded on contract, though several defendants be named in the summons, the plaintiff, on demand by one of them, may deliver to the latter a copy, with his name only inserted as defendant, omitting the others. This view seems very questionable, and the case is certainly one that ought not to be followed as a precedent, when a few additional words will remove all question on the subject.

*Filing.*—As before noticed, the filing of the complaint is, at one time or other, essential. In strictness it ought, in all cases, to be filed within ten days after service; Code, sec. 416; and

this was held to be obligatory in *Toomey v. Shields*, 9 L. O. 66. In practice, however, the complaint is seldom, if ever, filed before the entry of judgment; nor does it seem necessary to do so, unless upon order obtained by the adverse parties, under the same section, (416.) The terms of the section itself clearly show, that an omission to file the complaint before the service of such an order, will not be a serious, or even an impeachable irregularity. Such an order once obtained, however, the filing then becomes imperative, and an omission to comply with the direction will, as a general rule, be fatal; although, where the omission is unintentional and explained, the court may allow it to be rectified. See *Short v. May*, 2 Sandf. 639. The mere filing will be a sufficient compliance with the order, and it will not be necessary to serve the opposite parties with notice of that compliance. *Douay v. Hoyt*, 1 C. R. (N. S.) 286. In practice, however, this is generally done, and ought to be done, as a matter of fairness and courtesy.

Where service takes place by publication, it is, however, necessary that the complaint should be filed at once, and before the issuing of the summons, or the proceeding will be irregular. In real actions, also, it is now necessary, under the recent amendment of sec. 132, that the complaint should be filed at the outset of the suit, inasmuch as, until that is the case, the notice of pendency of action cannot be placed on record. Under the Code of 1849, this was otherwise, and it was there provided that the notice in question might be given at "the time of commencing the action," without reference to the complaint being or not being previously filed.

### § 136. *Collateral Proceedings.*

The mention of the above subject naturally introduces the concluding topic of this chapter, *i. e.*, the collateral proceedings advisable to be taken by the plaintiff, in certain cases, in connection with, and at the time of the preparation and service of his first pleading. These proceedings are two-fold; the first of them being the notice of the object, and the second, the notice of the pendency of the action.

*Notice of Object of Action.*]—The following is the section of the Code in reference to the former:

§ 131. In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice, subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that no personal claim is made against such defendant; in which case no copy of the complaint need be served on such defendant, unless, within the time for answering, he shall, in writing, demand the same. If a defendant, on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

Under the Code of 1849, this proceeding was confined exclusively to actions for partition and foreclosure, and was not admissible in any others. This defect is now removed, and, therefore, under any circumstances whatever, a notice of this sort may now be served upon mere formal defendants. The plaintiff must, however, be careful not to do so with respect to any party against whom substantial relief is sought. See this subject already considered, under the head of Summons. For form, see Appendix.

*Notice of Lis Pendens.*—The second proceeding above alluded to, is the notice of pendency of action, commonly called notice of *lis pendens*, which, in all real estate cases, is admissible, and, in the case of foreclosure, indispensable.

The provisions of section 132, on this subject, are as follows :

§ 132. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby; and, if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby.

It will be seen, then, that this proceeding is admissible at any stage of the suit, after the complaint is filed. In practice, however, it is universally taken at the commencement. The advantages of this course are obvious, in every case, and under all circumstances; and that, not merely as regards the county where

the action is brought, but every county in which there are any lands which can be affected by it, in case the property be scattered. No prudent practitioner will neglect taking this precaution, or will neglect taking it at the outset. By doing so, he places a stop upon the property, and prevents it from being subsequently dealt with, in prejudice of his client's rights. By omitting to do so, he leaves those rights still liable to be defeated by subsequent acts, notwithstanding the steps taken in the suit for their actual assertion.

In *Griswold v. Miller*, 15 Barb. 520, it is held that actual notice to a purchaser, of the pendency of a proceeding affecting the property purchased, arrests all further proceedings, and, if the purchase is persisted in, it will be held to be fraudulent. The conveyance in that case was set aside, the purchaser being aware, at the time he bought, that proceedings were then actually pending against the vendor, as an habitual drunkard. It is true that, in that case, no notice of the above nature had been filed, or was relied on, but the doctrine laid down bears directly on the subject now under consideration.

In foreclosure, the filing of such a notice, at least twenty days before judgment is rendered, is, as will be seen, a condition precedent to obtaining the relief demanded. See also Rule 46 of the Supreme Court, and *Brandon v. McCann*, 1 C. R. 38. Inasmuch as a full description of the suit in general, and particularly of the property affected, is a necessary incident to the validity of a notice of this description, it seems to follow, as a necessary consequence, that, if the plaintiff, after filing his notice, subsequently amend his complaint in substantial matter, either as regards the parties to the action, the premises affected, or the relief claimed, a new notice should be filed, in accordance with the fresh matter pleaded; and such is the general practice.

In *Learned v. Vandemburgh*, 7 How. 379, where lands had been seized under an attachment, it was considered by the court, that, in order to make that attachment effectual, as against *bonâ fide* purchasers and encumbrancers, a notice of this description was necessary to be filed.

Forms of this proceeding are given in the Appendix.

The due filing of the notice may be proved, either by affidavit, or by the certificate of the county clerk with whom it is filed. In all cases, therefore, a duplicate copy should be kept, on which that certificate may be endorsed, or which may be annexed to the required affidavit, where that form is adopted.

## CHAPTER II.

OF THE DEFENDANT'S COURSE OF ACTION, ON BEING SERVED  
WITH PROCESS.

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THE present chapter will be devoted to the consideration of the different proceedings, which may, or which must be taken by the defendant, on being served with process, including, in the last place, the time allowed to him for the purpose of pleading in the action.

§ 137. *Defects in Summons.*

In the first instance, the summons itself should be carefully examined, to see whether it be or be not in any manner defective; and, if so, the objection on that ground must be taken at once. The proper proceeding for this purpose is a motion. See *Nones v. The Hope Mutual Insurance Company*, 8 Barb. 541; 5 How. 96; 3 C. R. 161; and that motion must be made at once, and, where the summons and complaint are served together, without any previous notice of appearance. If such notice be given, the defendant, by taking that course, will have admitted himself to be regularly in court, and, having done so, all defects in the summons, or its service, or even the want of any summons at all, will then become immaterial. *Dix v. Palmer*, 5 How. 233; 3 C. R. 214; *Flynn v. The Hudson River Railroad Company*, 6 How. 308; 10 L. O. 158; *Webb v. Mott*, 6 How. 439; *Voorhies v. Scofield*, 7 How. 51; *Hewitt v. Howell*, 8 How. 346.

Where, however, the summons is served without the complaint, and is defective, by reason of being founded on the wrong subdivision of sec. 129, so as to mislead the defendant as to the nature of the relief demanded against him, it seems this rule will not hold good; and the defendant may move, on a defect first made apparent to him, on service of the com-

plaint. *Voorhies v. Scofield*, 7 How. 51. See, also, *Field v. Morse*, 7 How. 12.

The different points in which summons may be defective, have already been enlarged upon, in the chapter devoted to its consideration. The question as to how far the sheriff's return of service will or will not be deemed conclusive, has been also there considered. See *Van Rensselaer v. Chadwick*, 7 How. 297, there cited, where a motion, on the ground that the summons had been served on a wrong party, was sustained.

### § 138. *Notice of Appearance—Demand of Copy Complaint.*

After any preliminary objections to the summons itself shall have been thus disposed of, the next point to be attended to, is the giving due notice of appearance by the defendant's attorney. This is a most essential precaution, and should be looked to at once, as it may often be highly advisable, even when a defence to the action is not contemplated. If omitted, the defendant will not be entitled to further notice in the suit, whilst, if he appear in due form, he must be served with such notice, in all cases, and particularly with reference to the entry of judgment under sec. 247. It will thus be in his power to supervise the plaintiff's subsequent proceedings, with reference to the amount of his demand, or otherwise.

In *White v. Featherstonhaugh*, 7 How. 357, it was held that such notice must be served, before the time for answering expires, or the plaintiff will not be bound to delay entering judgment by default, for the purpose of giving notice of assessment. In *Abbott v. Smith*, however, 8 How. 463, this conclusion is denied, and it is held that such a notice will be effectual, if served before judgment entered, in all cases where an assessment of damage is necessary. The latter view seems undoubtedly preferable.

A defendant, who has not been served, is not entitled to give a notice of this description. *Tracy v. Reynolds*, 7 How. 327.

A voluntary service of the complaint by the plaintiff, not accompanying the summons, but subsequently, in connection with other proceedings, will, it seems, be of no operation in extending the defendant's time to answer, or preventing the

plaintiff from entering up judgment, at the expiration of twenty days from the original service. *Van Pelt v. Boyer*, 7 How. 325.

An appearance, without answer, does not however entitle the defendant to notice of an application for an injunction. That application is not an "ordinary proceeding in the cause." *Becker v. Hager*, 8 How. 68.

Of course, if any objection exists to the summons, or on the ground of deficient service, the defendant's attorney must not give notice of appearance, till the question shall have been decided. See last section, and cases there cited. If, pending the motion for that purpose, the time for answering should be drawing out, he may apply for a stay of all proceedings until the decision of the motion, and some reasonable time after, but without prejudice to the questions raised upon the motion. Such an order as this, would probably be held not to be a recognition of the validity of the plaintiff's proceedings.

Even when a copy of complaint has been served with the summons, the sooner notice of appearance is given, the better. No particular form is required for such notice, but it should be in writing, and served on the plaintiff's attorney. (See Rule 7 of the Supreme Court.) Where, however, the summons has been served alone, the notice should be accompanied by the demand of a copy of the complaint, and, in these cases, the immediate service may, or may not, be a matter of expediency. Where delay is not an object, of course the defendant will be anxious to gain an insight into his adversary's case, as soon as possible: but, where he wishes, on the contrary, to gain time, he may, under sec. 130, delay further proceedings on the part of the plaintiff, for twenty days, by serving the notice on the last day allowed for that purpose.

The demand as above, must, under the special provisions of sec. 130, be in writing, and must specify a place in the State where that copy may be served. It may be made either in person or by attorney, though, if an attorney have been employed in the action, the latter will be the proper person to make it in all cases; and the party making it will, of course, take care to name his real place of residence or business, in order to insure the direct service upon him of all subsequent notices or papers in the suit. (See Rule 5 of the Supreme Court, and sec. 417 of the Code.) For form of notice and demand, see Appendix.

Under the Code of 1849, this proceeding could only be taken within ten days after service of the summons. If not demanded within that time, the plaintiff was not bound to serve a copy of his complaint afterwards, unless by special order of the court, *Bennett v. Dellicker*, 3 C. R. 117; in which case, an order, denying a copy of the complaint under such circumstances, was sustained. As a general rule, however, the courts were disposed to grant an application for that purpose, but, of course, upon proper terms. See the same case, and also *Engs v. Overing*, 2 C. R. 79.

In both these cases a strong bias was shown by the court in favor of the plaintiff's filing his complaint at once, in all cases where a copy is not served.

In *Toomey v. Shields*, 9 L. O. 66, it was even held that he was obliged to do so, within the time allowed to the defendant to answer, and a judgment obtained in the usual mode was actually set aside, on the ground that this had been omitted. It seems clear, however, that the conclusion in this last case is erroneous. The Code contains no provision whatever to warrant it.

Under the recent amendment, these questions are no longer likely to arise, the defendant's power to demand a copy of the complaint being now extended to twenty days, the full period allowed him to answer.

Under the Code of 1849, no period was limited, within which the copy of the complaint so demanded was to be served, and there was, in consequence, a great division of opinion among the judges upon the subject. In *Littlefield v. Murin*, 4 How. 306, 2 C. R. 128, twenty-four hours was considered a reasonable time; and, in *Wabath v. Ktller*, 2 C. R. 129, similar views are enounced. Forty-nine days were clearly held to be an unreasonable time in *Eeles v. Debeand*, 2 C. R. 144. In *Colvin v. Bragden*, 5 How. 121; 3 C. R. 188, and *Munson v. Willard*, 5 How. 263, 3 C. R. 250, twenty days was fixed upon as a proper period, in analogy with the time given to answer or reply; and it will be seen that this last period has been adopted by the legislature, and is now the rule for the future.

In case the plaintiff complies with the demand, and serves the copy, the defendant's time to answer runs from the date of that service, without regard to the original service of the summons. It is clearly, therefore, the plaintiff's interest to do so,



as speedily as possible. An attorney, representing several defendants, is entitled to only one copy. See sec. 130.

### § 139. *Motion to Dismiss.*

*For want of Service, as above.*]—The service of this copy within the time demanded, is absolutely obligatory under the present measure, the term “must” being employed, instead of “shall,” the term used in the Code of 1849. The defendant's attorney will not be bound to accept service of a copy, served after the time has elapsed. *Mandeville v. Winne*, 5 How. 461; 1 C. R. (N. S.) 161. He is entitled to give his notice of motion to dismiss, immediately the plaintiff is in default in this respect; and, if the copy be served after that notice, the not returning it immediately will not be considered as a waiver of the objection. *Baker v. Curtiss*, 7 How. 478. If, however, the complaint had been served before such notice, and had been either retained or returned by the defendant's attorney, without giving notice of the objection to receive it, it was considered, in the same case, that the doctrine of waiver might have been applied. A defendant not served with process will not be entitled to appear voluntarily, nor can he, by such an appearance, entitle himself to make a motion of this description. *Tracy v. Reynolds*, 7 How. 327.

Although, under the previous Code, no definite time was fixed in relation to the service, under these circumstances, a similar rule to that now prescribed with reference to the defendant's right to move for a dismissal, had been laid down in the cases of *Littlefield v. Murin*, *Wulrath v. Killer*, *Eccles v. Debeand*, *Colvin v. Bragden*, and *Munson v. Willard*, above noticed.

In the cases last alluded to, a “*locus penitentie*” was given to the plaintiff. Under the present measure that privilege can no longer be depended upon, and, therefore, special care should be taken by the plaintiff to complete and serve his complaint within the twenty days, in all cases. If he cannot do so, he should, on no account, omit to apply to the court for an order extending the time allowed, and this application should be made before the time in question has expired. If this precaution be neglected, the order cannot afterwards be obtained *ex parte*, or, if obtained, will be set aside. *Stephens v. Moore*, 4 Sandf. 674.

Of course, in reference to the different periods of time above referred to, and elsewhere throughout the work, the nature and incidents of service by mail, where admissible, and the effect of that service in doubling the ordinary periods allowed, must not be lost sight of.

The form of a notice of motion for the above purpose, will be found in the Appendix of Forms. It should be supported by an affidavit of service of the demand, and of the non-receipt of the copy demanded, within the twenty days now allowed. This form of motion is proper in such cases, and falls within the powers of the court, as conferred by sec. 274. *Baker v. Curtiss*, above cited.

The motion for this purpose must be made, in the district, or in a county adjoining that in which the summons states the complaint will be filed. That county will be presumed to be the county of venue. *Johnston v. Bryan*, 5 How. 355; 1 C. R. (N. S.) 46.

*On other Grounds.*]—In *Elliott v. Hurt*, 7 How. 25, it was considered that the proper course to pursue in relation to the misnomer of defendants, was to move to set aside the summons and complaint. The application will be in the nature of the former plea in abatement. See *Gardiner v. Clark*, 6 How. 449.

A motion of this description will be proper, in relation to an action in the nature of the former creditors' bill, where the amount of the plaintiff's claim is less than the \$100 prescribed by statute. *Shepard v. Walker*, 7 How. 46.

### § 140. *Defendant's Course, on Service of Complaint.*

The following observations are of course appropriate, *ab initio*, to those cases in which the summons and complaint are served together. The last head of the last section is also, in strictness, more appropriate to the present, although, for the sake of perspicuity, it was thought better to cite the two cases there referred to, in connection with the subject of a motion to dismiss, by the defendant, at the outset of the cause.

*Examination of Complaint, Motions for structural Defects.*]—On the copy complaint being served, it should, at once, be examined with care, to see whether any inherent defects exist in its struc-

ture, which may be made the subject of a motion under sec. 160. The nature of the different defects on the score of irrelevancy or redundancy, impeachable by this mode of proceeding, and the course to be adopted for that purpose, have been already fully detailed, in the introductory chapter on the correction of pleadings. The same remark applies to the subject of motions to compel the plaintiff to render his pleading more definite and certain, under the powers of the same section. Of a like nature are the recent amendments in section 122, in relation to the powers now given, of interpleader, and substitution of one party for another, also fully considered under the head of Parties.

*Demand of Particulars.*—Although the complaint be perfect in its form, it may, in certain cases, be deficient in the necessary information for the defendant's guidance, in cases where an account is alleged, and the plaintiff avails himself of the permission conferred by section 158, and omits to state the items of it. In this case, the defendant should forthwith demand a copy of such account, under the powers of that section. For the form of demand, which must be in writing, and served in due form, see Appendix. In *West v. Brewster*, 1 Duer, 647; 11 L. O. 157, it was held that, where the particulars required by the defendant are within his own personal knowledge, as in that case, where the plaintiff's action was for an account of moneys collected by defendant himself, as attorney of the plaintiff, the latter will not be bound to furnish a bill of particulars, unless under special order.

If the complaint be verified, the copy account or bill of particulars furnished by the plaintiff must be verified also; (see same section :) and, if this be omitted by the plaintiff, the defendant should give immediate notice of the defect to the plaintiff's attorney, and return the defective paper. See *Laimbeer v. Allen*, and other cases previously cited with reference to the return of defective papers, in the introductory chapter, as to the formal requisites of pleading.

If the plaintiff omit, in such case, to serve a properly verified copy, or if the copy regularly served, be deficient in the necessary information, the defendant should apply, in the usual manner, for an order, requiring the plaintiff to render a further and more definite account. See same section. The case of *Wiggins v. Gaus*, 3 Sandf. 738, 1 C. R. (N. S.) 117, though not

directly in point, will afford an indication as to what the court will consider as clearly an insufficient compliance with such a demand. If the plaintiff omit to comply with the demand at all, and the exclusion of evidence of the account be not sufficient for the defendant's purpose, he should then apply to the court for a special order upon the subject, under the last clause of the section above referred to; which order would doubtless be made, as of course, on proof of the demand, and of the plaintiff's non-compliance, and it would be wise to make a general stay of proceedings a part of the order so asked for.

In *Yates v. Bigelow*, 9 How. 186, it was held that a further account of this nature may be enforced by motion, after all the pleadings have been put in, its chief object being to enable the defendant to prepare for the trial.

The Code of 1849 was defective, in confining the defendant's right, in such respects, to cases in which an account was alleged in the complaint. The recent amendment cures this defect, and the defendant may now, in all cases, apply to the court, that the plaintiff may be ordered to furnish a bill of particulars. Whenever, therefore, the statement of the plaintiff's case is too general, and the details require to be given, in order to enable the defendant to meet that case in a proper manner, he should apply forthwith for an order of this description, which may be obtained *ex parte*, and without any further evidence than that afforded by the pleading itself; and, if the plaintiff meet this requisition evasively, a second order, for a further and more particular bill, should be obtained. The plaintiff possesses similar rights as against the defendant, in cases where a set-off is claimed by the latter.

In case of non-compliance with these provisions, and especially with those in relation to the verification of the bill so delivered, the plaintiff will be precluded from giving evidence of the account omitted to be furnished. One point, in relation to this remedy, seems to have been left unprovided for in the rules of the court, and that is, with reference to delay, on the part of the plaintiff, in furnishing the bill so required. By analogy with the provisions of Rule 11, in relation to the discovery of books and papers, an order for furnishing a bill of particulars ought to operate as a stay of proceedings, and as an extension of the time to answer, until such order shall have been complied with or vacated. The reasons for the one ap-

pear to be equally forcible with respect to the other, but no express provision seems to have been made upon the subject. In the event, therefore, of any delay or evasiveness, on the part of the plaintiff, in complying with the demand, the defendant should apply for an order staying all proceedings, and extending the time to answer, until after due compliance on the part of the plaintiff. This order would, doubtless, be considered as of course, on the facts being made apparent.

*Discovery, &c.*—The next point to be considered is, as to whether the inspection of any books, papers or documents, in the possession or under the control of the plaintiff, is necessary or advisable, on the part of the defendant, for the purpose of enabling him to prepare his answer, in the action. If so, he possesses, under sec. 388 of the Code, the power of enforcing that inspection, and obtaining a copy, or permission to take a copy of the documents inspected, by means of an order of the court, which order, as before remarked, stays all proceedings, and extends the time to answer until it is either complied with or vacated. The measures for this purpose, and the cases on the subject, will be found fully treated of hereafter, in connection with the proceedings between issue and trial.

Of a similar nature are the powers conferred by the chapter of the Code in reference to the examination of parties, c. VI. of title XII. of part II., and particularly by sec. 391, in that chapter. In *Chichester v. Livingston*, 3 Sandf. 718, 1 C. R. (N. S.) 108, doubts were entertained as to whether this proceeding could be taken before issue joined, unless upon leave specially obtained from the court. This opinion is, however, expressed very doubtfully, and with an express reservation, that cases might arise, where the ends of justice required such examination, before answer or reply; and *Miller v. Mather*, 2 C. R. 101, is direct authority to the contrary. It was there held that "such examination being provided by the Code as a substitute for the former bill of discovery, is governed by the rules applicable to such bills; and a discovery, by bill of discovery, might be had at any time during the progress of the suit." The latter view seems the correct one. Under sec. 391, the examination may be had "at any time before the trial, at the option of the party claiming it;" and all that is there prescribed, is a previous notice to the party to be examined, and any other adverse party,

of at least five days, unless by special order of the court. There is nothing in this section, or in any other part of the chapter above referred to, to qualify the above provision; and therefore, it appears to be clear, that, in cases where an examination of the plaintiff is absolutely essential for the purposes of the defence, that examination may be had in this manner, before answer put in, and for the purposes of that answer. Of course, this proceeding will not be taken without due deliberation, because the chapter in question appears to contain no provision enabling the defendant to repeat such examination, when once had. At the actual trial, however, the adverse party may, it would seem, be called as a witness, in all cases; though, if so called, his previous examination cannot then be used. The proceedings in relation to the above measure, on the part of the defendant, will also be found fully considered, and the cases cited in detail, in connection with the proceedings between issue and trial.

#### § 141. *Precautionary Proceedings of Defendant on his own behalf.*

The above precautionary measures have reference to the eliciting of information from the adverse party, with a view to the due preparation of the defensive pleading. The following relate to precautions on the part of the defendant himself.

*Tender.*—In cases where a tender was admissible under the old practice, that tender may still be made. The law on this subject is, however, in no manner affected by the Code; and, accordingly, the plan adopted at the outset of the work, forbids any lengthened consideration as to its details. The statutory provisions on the subject will be found at 2 R. S. 553, and all other necessary information may be obtained from the old books of practice.

The following recent cases, in relation to what will or will not constitute a sufficient tender, and the circumstances attendant thereon, may be advantageously looked to; viz: *Wilder v. Seelye*, 8 Barb. 408; *Hull v. Peters*, 7 Barb. 331, 3 C. R. 255; *Holmes v. Holmes*, 12 Barb. 137, affirmed by the Court of Appeals, 18th April, 1854. A tender, to be of any effect, must be complete in

all its parts, and, to be available as a defence, it must be fully and specifically pleaded, or it will be of no effect. Thus, in *The People v. Banker*, 8 How. 258, a tender, made after suit brought, in which the costs up to that time were not included, was held to be fatally defective; and, in *Brevoort v. Randolph*, 7 How. 398, a tender of his principal and interest to a mortgagee in the city of New York, without including an assessment paid by him, and interest on that assessment, was held to be unavailing to extinguish his lien.

The old practice of paying money into court seems also to be still admissible, in cases where that course may be thought advisable, though, in most instances, an offer under the provision next commented upon would answer the same purpose.

*Offer to compromise.*—The Code provides an analogous remedy to the above, by section 385, under which the defendant is empowered to make an offer to compromise the cause, without prejudice, if refused. That section runs as follows:

§ 385. The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing, to allow judgment to be taken against him, for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk must, thereupon, enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs, from the time of the offer.

It is obvious that, wherever admissible, *i. e.*, in all cases where the defendant cannot dispute the correctness of a part of the plaintiff's demand, but contests it as to the residue, this course is highly expedient to be pursued, both in respect to its bearing on the eventual costs of the suit, and also as regards the possibility of its bringing about a compromise on some other terms, even if those actually tendered by the offer be not accepted. Under the Code of 1849, this remedy was confined to actions "arising on contract," but, by the recent amendments, the defendant's right to do so is extended to all cases whatsoever, of every nature. It is therefore probable that, for the

future, this provision will be more extensively acted upon in practice than heretofore. In actions for damages, where an injury has really been committed, and the defendant is ready to pay a moderate sum, but not the amount demanded, and there is a fair probability that a jury might be found to concur in his estimate of the actual compensation due, it might be a most advantageous course, especially as, if not accepted, it in nowise prejudices the ulterior prosecution of his defence; and many other instances might be given.

The signature of the defendant's attorney to an offer as above, is sufficient, as being equivalent to the signature of the defendant himself. *Sterne v. Bentley*, 1 C. R. 109; 3 How. 331. It is not necessary that the offer should contain any special statement on the subject of costs. The allowance of them follows, as of course, if it be accepted. *Mcgrath v. Van Wyck*, 3 Sandf. 750, 1 C. R. (N. S.) 157. In an action against defendants jointly liable, an offer by one defendant, the other making no defence, will subject the plaintiff to costs, if he fail to recover more than the sum mentioned. *Laforge v. Chilson*, 3 Sandf. 752, 1 C. R. (N. S.) 159. See, also, case of *Lippman v. Joelson*, to same effect, cited in note, 1 C. R. (N. S.) 161. The above cases proceed upon the ground that it is competent to the plaintiff to enter judgment against both parties, as joint debtors, under the offer so made. In *Ohwell v. McLaughlin*, 10 L. O. 316, it was held that an offer made by one partner in a firm will bind their joint property. See, likewise, *Emery v. Emery*, 9 How. 130.

Although the defendant, on a verdict being given for less than the offer, is entitled to his costs, he cannot recover an extra allowance, under secs. 308 and 309. *McLees v. Avery*, 4 How. 441, 3 C. R. 104. The ordinary costs, however, will, in all cases, be quite a sufficient inducement to the adoption of this course, wherever admissible.

The advantages of this course being pursued, wherever admissible, are demonstrated by the case of *Smith v. Olssen*, 4 Sandf. 711, where an application for the defendant to satisfy an admitted portion of the plaintiff's claim, under sec. 244, was refused, on the ground that a previous offer, to the same effect, had been made, and refused by the plaintiff.

An offer of this description precludes the defendant from taking any steps in the cause, until the ten days allowed to the



plaintiff have expired, or his written acceptance or refusal of it be received. The election to be made by the latter must be made in writing; evidence of one made by parol, will not avail the defendant, or render any proceedings regular, which he may take within the period in question. *Walker v. Johnson*, 8 How. 240; *Pomeroy v. Hulin*, 7 How. 161.

Nor can the defendant, by taking this course, deprive the plaintiff of his right to proceed. He must make the offer at such a time that the plaintiff may also have the full benefit of his election, and if it is served too late, so that the cause can be reached and tried within the ten days, the rights of the parties are in all respects as if no offer had been made. *Pomeroy v. Hulin*, above cited.

The virtual result of the cause, and not the actual amount recovered by the plaintiff, will govern the question as to the defendant's right to costs. Thus, in *Ruggles v. Fogg*, 7 How. 324, where the plaintiff failed to recover a more favorable judgment in amount than that offered by defendant, but, on the trial, extinguished a counter-claim which, with the verdict, exceeded the defendant's offer, it was held that he was entitled to full costs.

Where, however, the verdict is in any measure less than the sum offered, with subsequent interest to the date of trial, the reverse will be the case, and the defendant entitled to the benefit of the proceeding. The acceptance of the offer, and entry of judgment thereon, extinguish the counter-claim. *Schneider v. Jacobi*, 1 Duer, 694; 11 L. O. 220.

In relation to an offer to take judgment, entitling the plaintiff to the performance of a specific act, and the mode in which that performance may be enforced, see *Fero v. Van Eyra*, 9 Howard, 148.

With reference to compromise in general, the enabling provisions of c. 257, of the Laws of 1838, as amended by c. 348, of those of 1845, see vol. II. of third edition of the Revised Statutes, p. 61, with reference to compromises or compositions, effected by one out of several partners or joint debtors, should not be lost sight of, where a defendant, desirous of compromising, stands in either of those positions. To enter into any detailed consideration of the subject would, as before stated, be inconsistent with the plan of this work, it being, strictly speaking, a remedy under the old practice. Assuming such a compromise to be effected

during the progress of the suit, and before judgment, by one of several defendants, desirous of getting rid of his individual liability, a consent to dismiss the action, as against him, should be obtained from the plaintiff's solicitor, as part of the arrangement, and a judgment of dismissal, without costs, entered thereupon. If that consent be refused, the proper course will then be to plead the memorandum to be taken under the statute, or, if issue be already joined, to apply to the court for leave to file a supplemental answer for that purpose, and then apply to the court for judgment thereon, by motion, or order to show cause, in the ordinary form.

### § 142. *Defendant's Proceedings with reference to Plaintiff.*

The questions as to the eliciting of necessary information, and also as to the precautionary proceedings of the defendant, in relation to the defence to be put in, and the incidental subject of compromise, having thus been treated of; the next point to be noticed is that as to certain precautionary proceedings, which such defendant is at liberty to take, with reference to the further prosecution of the suit by the plaintiff.

*Security for Costs.*—The first of these is the defendant's power to require security for costs, in certain cases.

This is a matter in which the old system still subsists, without alteration by the Code; and the old books of practice should, accordingly, be referred to. The statutory provisions on the subject are contained in title II., chapter X., part III. of the Revised Statutes, 2 R. S. 620. The instances in which the defendant is thereby entitled to this security, are as follows:

1. When the suit is commenced on behalf of a plaintiff, not residing within the jurisdiction of the court, or on behalf of several plaintiffs, who are all non-residents.

2. When it is commenced for, or in the name of the trustees of any debtor.

3. When it is commenced for, or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been exonerated from imprisonment pursuant to any law, and that, for the collection of any debt contracted before the assignment of his estate.

4. When it is commenced for, or in the name of, any person committed in execution for any crime; or,

5. When it is commenced for, or in the name of, any infant, whose next friend has not given security for costs.

If, too, after the commencement of the suit, the plaintiff, or plaintiffs, shall subsequently become classifiable under Nos. 1, 3, or 4 of the above provisions, the defendant may likewise require such security.

In addition to the provisions above noticed, there is also a special power contained in sec. 317 of the Code, empowering the court to require the plaintiff to give security for costs, in actions prosecuted or defended by executors, or other parties standing in a fiduciary relation.

The security to be so given, is to be in the form of a surety-bond, in at least \$250; the sureties to justify, if excepted to: and the mode of compelling the plaintiff to give it, is by application to the court, upon affidavit, for an order to the effect that the plaintiff give such security within twenty days, or show cause, at a period named in the order, why such security should not be given, with an interim stay of proceedings.

In cases of the above nature, the plaintiff's attorney is temporarily liable for costs, to an amount not exceeding \$100, until security shall have been given; and this, whether it have been required by the defendant or not; but such attorney may discharge himself from that liability, by filing security of his own motion, giving notice thereof to the defendant. The mere obtaining of an order by the defendant, does not discharge the attorney from such liability, in case the security required be not perfected, even though the defendant proceed, without waiting the result. The demand of such costs does not, however, entitle the defendant to process against the attorney in the first instance. That process can only be founded on a demand after the order is made, and after service of a certified copy, and is not obtainable until the expiration of the twenty days allowed by Rule 35 for that purpose. *Boyce v. Bates*, 8 How. 495. In the proceedings for this purpose, the original right to require security, must be affirmatively shown. *Moir v. Brown*, 9 How. 270.

In *Gardner v. Kelly*, 2 Sandf. 632, 1 C. R. 120, it was contended, in opposition to a motion for this purpose, that the above provisions were repealed by sec. 303 of the Code. The court held, however, that such was not the case, that those pro-

visions were still subsisting, and that the defendant was accordingly entitled to such security under them.

In *Abbott v. Smith*, 8 How. 463, it was held that a motion for this purpose is sustainable, after default suffered, but before judgment entered. In *Gardner v. Kelly*, above cited, this species of relief was even granted, after judgment by default against the defendant had been actually entered, on leave being subsequently given to him to answer. "If, however," the learned judge said, "the plaintiff had required that restriction to be imposed upon the defendant, when he applied for leave to open his default, it would probably have been granted."

It is not, however, imperative to grant the application, if unreasonably delayed. Thus, in *Florence v. Bulkley*, 1 Duer, 705, 12 L. O. 28, where the application, as against an infant, was not made till after the cause had been referred and noticed for trial, the attorney and guardian being both responsible, the application was refused. In the same case it was laid down that, if the plaintiff is permitted to sue *in forma pauperis*, he cannot be required to give security for costs, nor can he be permitted to sue in that character, on application made after he has been required to file such security.

If the defendant, having obtained such an order, afterwards proceed in the cause before it is complied with, it will effect a waiver of the stay of proceedings, and the plaintiff will be at liberty to appear and prosecute the cause. The defendant's claim against the attorney will not, however, be prejudiced by his adopting this course. *Boyce v. Bates*, 8 How. 495, above cited.

The order to file security for costs should be in the alternative, according to the old practice. When the plaintiff gives security, with justification, in the first instance, and the defendant excepts, the justification must be repeated, and until that is done, time will not commence to run as against the defendant. *Branson v. Freeman*, 8 How. 492.

A non-resident administratrix, though prosecuting in the right of the intestate, is bound to give security, if required, for such costs, if any, as may be awarded against her, "*de bonis propriis*." *Murphy v. Darlington*, 1 C. R. 85.

The power of requiring security from an executor, administrator, or trustee, under sec. 317, is, however, strictly discretionary. It will not be required, merely upon the ground that

the estate he represents is insolvent. *Darby v. Condit*, 1 Duer, 599, 11 L. O. 154.

The bond as security for costs need not follow the exact words of the statute. It will be a sufficient compliance with it, if it be equally favorable to the defendant, and if the spirit of the statute is carried out by it. *Smith v. Norval*, 2 Sandf. 653, 2 C. R. 14.

Where the plaintiff is non-resident, the defendant's right to require security subsists, notwithstanding that the former may have subsequently assigned the alleged cause of action to a resident, so that the latter has, in fact, become the real party in interest. The plaintiff on the record cannot, by his own act, divest himself of his liability to the defendant for costs. *Phoenix v. Townshend*, 2 C. R. 2; see also note, 2 Sandf. 634.

A plaintiff resident at Brooklyn, must give security for costs in proceedings in the Superior Court. *Blossom v. Adams*, 2 C. R. 59; 7 L. O. 314. The same point is decided in *Ahsbaht v. Cousin*, 2 Sandf. 632.

An infant joint plaintiff cannot be required to give security for costs, nor is the attorney liable, under the Revised Statutes, in such case, or in others where defendant cannot require such security. *Hulbert v. Newell*, 4 How. 93.

It would seem that, in cases pending in courts of limited jurisdiction, the security must be given by some person residing within the jurisdiction of the court. See *Herrick v. Taylor*, 1 C. R. (N. S.) 382, (note.)

Where security has been filed pursuant to an order, and twenty days have elapsed without objection as to the amount of the bond, the court will not entertain an application to increase the amount. *Castellanos v. Jones*, 4 Sandf. 679.

*Change of Venue—Demand of Trial in proper County.*—With reference to the forum in which the cause is to be tried, the defendant possesses, under sec. 33, the power of removing any transitory action from the New York Superior Court, or Court of Common Pleas, into the Supreme Court, as before noticed in the introductory chapters as to the jurisdiction of those tribunals. The application is to be made to the Supreme Court, upon motion; and, on the order being obtained, a certified copy is to be filed in the office of the clerk of the court from which the action is removed. On filing of such copy, the cause is to be deemed as removed, and all process and proceedings on file

are to be forthwith delivered to the clerk of the county in which the trial is ordered to be had. In certain cases, also, the defendant possesses the power of removing the case into the United States' courts. See introductory remarks on the subject. See, also, *Field v. Blair*, 1 C. R. (N. S.) 292, 361; *Suydam v. Ewing*, Id. 294.

When, too, the county designated by the plaintiff in his complaint, is not the proper county, it is in the power of the defendant to obtain a change, under the provisions of sec. 126. This proceeding must not be confounded with the ordinary motion to change the venue on grounds of convenience, the proper time for making which is after issue, and which will accordingly be treated of hereafter, at that point in the progress of the cause.

The proceeding for the former purpose is prescribed by the above section, and consists of a demand, in writing, that the trial be had in the proper county. This demand must be made before the time for answering expires; and the consent of the opposite party, or the order of the court for such removal, must be thereupon obtained. If these proceedings be not taken on the part of the defendant, the case may still be tried by the plaintiff in the county originally named, though not the proper one.

Under the Code of 1849, this section did not in terms prescribe that the demand of a change should be followed up by an order for that purpose, but it was, nevertheless, held in *Hassbrouck v. McAdam*, 4 How. 342, 3 C. R. 39, that, under that measure, a bare demand in writing was not sufficient, unless followed up by an application to the court by one party or the other, and that either party might make it; and it was likewise laid down that if, after receiving such notice, the plaintiff neglected or refused to take the necessary measures, the defendant might avail himself of such omission on the trial, by application for the dismissal of the complaint. See also *Moore v. Gardner*, 5 How. 213; 3 C. R. 224; and *Mairs v. Remsen*, 3 C. R. 138; *Vermont Central Railroad Company v. The Northern Railroad Company*, 6 How. 106. The recent amendments of the Code put this beyond a doubt, and the defendant's course is clear under it, viz., to apply to the plaintiff's attorney for a consent founded on his demand, at the time of making it, and, if such consent be refused, then to apply to the court himself for that purpose. The necessary forms will be found in the Appendix.

The demand should be in the terms of the act, *i. e.*, "that the trial should be had" in the "proper county;" if these words be omitted, and a county simply named, it would seem that the demand would not be good. *Beardsley v. Dickerson*, 4 How. 81. If one county be named in the demand, a motion to change the venue into another cannot be grounded upon it, but a fresh demand must be made. *Vermont Central Railroad Company v. The Northern Railroad Company*, 6 How. 106.

The proper county in actions falling within sections 123 and 124, *i. e.*, real estate or local actions, is the county in which the premises affected, or some part thereof, are situate, or, as regards the latter, in that in which the cause of action arose. See also *Miller v. Hull*, 3 How. 325; 1 C. R. 113, with reference to the proper county in foreclosure cases; and likewise *Beardsley v. Dickerson*, 4 How. 81.

An action for specific performance of a contract is not, however, a local action, and may be tried in another county, or even in a court of limited jurisdiction elsewhere, as, for instance, in the Superior Court, provided the jurisdiction of such court be otherwise completely acquired. See *Auchincloss v. Nott*, 12 L. O. 119.

In actions of a strictly local nature, the demand that the trial be had in the proper county is as of right, and cannot be resisted on general grounds. See *Park v. Carnley*, 7 How. 355.

Where the action is not of a local nature, any county in which one at least of the parties resides, is a proper county. See *Hinchman v. Butler*, 7 How. 462.

In actions brought by the People, any county in the State may be the proper county. *People v. Cook*, 6 How. 448. An action brought against a public officer, for an act done by him by virtue of his office, ought, however, to be tried in the county where the cause of action arose. See Code, sec. 124, subd. 2; *The People v. Hayes*, 7 How. 248.

In *Goodrich v. Vanderbilt*, 7 How. 467, it is laid down as a general, though not an imperative rule, that the place of trial, in a transitory action, should be in the county where the principal transactions between the parties occurred; and the inconvenience of a trial in New York itself, was obviated, by granting an election to the parties, to substitute some neighboring county in its stead.

The above provisions do not, in any way, restrict the power

of the court to grant a change of venue on other grounds, on a proper application for that purpose. Nor is the power of the opposite party to make such an application in due time, impaired by his having previously complied with a demand to change the venue into the proper county, under the above provision. See *Moore v. Gardner*, 5 How. 243; 3 C. R. 224. The same case is authority that, on applications on the foregoing ground, the venue is to be fixed irrespective of the convenience of witnesses, but subject, of course, to the power of the court to change it subsequently on that ground, as above alluded to.

In *Mason v. Brown*, 6 How. 481, this last conclusion is doubted, on the ground that, where it is manifestly shown that the convenience of witnesses will eventually require the trial in another, it would be an idle ceremony to transfer the venue to the proper county in the first instance. This case was, however, one of conflicting motions, and is altogether "*sui generis*," and characterized as such in *Park v. Carnley*, 7 How. 355, where it is laid down that, in actions of a local nature, the demand is of right, and the change a matter of course. The parties must first be put right, after which, either has the privilege, at the proper time, of coming in and being heard, on the ground of the convenience of witnesses. It is indeed admitted in *Mason v. Brown*, that if the motion to change the venue into the proper county had been made before issue joined, which is clearly the proper time for making it, it must have been granted. The difficulty there arose from the defendant's delay, which gave the plaintiff an opportunity of making a counter motion, and bringing in counter evidence, which would otherwise have been inadmissible.

The demand of a change into the proper county, and the application thereon, may be made by one of several defendants. The consent of the others should, however, be obtained, or notice of the application given to them. *Mairs v. Remsen*, 3 C. R. 138.

The defendant must be careful to make his demand in due time, or his right to do so will be gone, and he may also waive that right, by acts inconsistent with its assertion.

Thus, where a defendant had served his answer before the expiration of the time allowed, and afterwards, within that time, demanded a change of venue under this section, it was held that the application was made too late. *Milligan v. Brophy*, 2 C. R. 118.



Such demand may, however, be made simultaneously with the putting in of the answer. *Mairs v. Remsen*, 3 C. R. 138, above cited.

It seems that, in all motions to change the place of trial, costs to abide the event will be allowed, if they are asked for in the notice, but, if not, the court has no power to make such order. *Northrop v. Van Dusen*, 5 How. 134, 3 C. R. 140. The power of the court to give costs of this description under any circumstances, has however been doubted. See *Johnson v. Jillitt*, 7 How. 485.

See hereafter under the head of Costs.

Under the Code of 1849, it was held that an order, changing the place of trial, as regarded the issue of fact, did not change the venue for other purposes. See *Gould v. Chapin*, 4 How. 186, 2 C. R. 107; *Barnard v. Wheeler*, 3 How. 71; *Beardsley v. Dickerson*, 4 How. 81; *Lynch v. Mosher*, 4 How. 86, 2 C. R. 54. But a change of trial into the proper county, always carried the venue with it, for all purposes. See Rule 3 of the Supreme Court on that subject. The question is now, however, put beyond doubt, in all cases, by the recent amendment.

For further considerations on the subject of the change of venue, see subsequent chapter, where the subject is generally considered, in reference to motions made for that purpose, on general grounds, and after issue joined.

### § 143. *Proceedings preliminary to Answer.*

*Appointment of Guardian, next Friend, &c.*—The following precautions apply to particular cases:

Where an infant is defendant, the first proceeding to be taken is the appointment of a guardian *ad litem*. Until this is done, no answer can properly be put in, or act properly done in the suit, on behalf of such infant. See previous chapter, in relation to the proceedings necessary for that purpose.

Of a like nature is the case of a wife defendant. As a general rule, she can only prosecute or defend by her next friend, and her husband, where their interests are not adverse, should be joined with her as a party. See this subject heretofore considered, and numerous cases cited under the head of Parties, in section 29, subdivision "*husband and wife*." In an anonymous

case, reported 11 L. O. 350, it was held that, where a wife defendant had commenced a cross action against her husband, she could not require him to furnish money for the prosecution of that action; on the ground that she might have obtained the same relief by her answer, properly interposed.

In certain cases, however, 1. Where the husband's interest is adverse to hers; 2. Where he is a defendant in her right, and she disapproves of the intended defence; 3. Where she lives separate from him; or, 4. Where he is out of the jurisdiction, or an alien enemy; the wife may answer separately, as under the old practice. See also as to real estate actions, 2 R. S. 340, secs. 4 and 5. In all these cases, however, the leave of the court to enable her to answer separately, must first be obtained. See *Newcomb v. Keltus*, 2 C. R. 152. The proceeding is in all respects as under the old practice.

*Application for Leave to defend, after Judgment, obtained by Publication.*—Where the summons has been served by publication, and, before judgment has been entered up, the defendant have notice of and decide upon defending the action, he must apply to the court for leave for that purpose. See Code, sec. 135, last clause. The application should be made upon the summons and complaint, if the same have been received, or else, upon proof of the publication of the summons; and such application should be accompanied by the usual affidavit of merits, or by other proof that the defendant has a real defence to the action, so as to show "sufficient cause" for making the application. When such cause is shown, the order would seem to be of course, as the section expressly provides that he "*must* be allowed to defend the action;" and the application may therefore be made *ex parte*, and not by special motion, or order to show cause.

*Caution, where Notice of Object of Suit served.*—Where the defendant has been served, under sec. 131, with notice of object of suit, and that no personal demand is made against him by the plaintiff, and he then defends, he does so at his peril, as far as regards the question of costs. If, therefore, he be convinced that the suit is one of this nature, and that, although a formal party, he really has no personal interest in the controversy, his taking any further steps in the matter will not merely be unnecessary, but unwise.

### § 144. *Time to plead.*

The different preliminary proceedings admissible on the part of the defendant, before pleading to the complaint, having thus been considered, the last point to be entered upon in the present chapter, is with reference to the time allowed to him for that purpose.

The section of the Code providing for this subject is No. 143, and runs as follows :

§ 143. The only pleading on the part of the defendant, is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

Precisely the same period is fixed by section 153, with reference to the reply to be put in by the plaintiff, where necessary, and the cases applicable to one description of pleading, are equally in point as regards the other. The subject of time to plead will, therefore, be here entered upon, as a whole; and all the cases upon the subject cited, whether applicable to demurrer, answer, or reply.

The first remark essential to be made on this head, is with reference to the effect of an order for discovery of papers, &c.; which order, under Rule 11 of the Supreme Court, operates as an entire stay of proceedings, until it is either complied with or vacated. The party obtaining such order, it is expressly provided by that rule, "shall have the like time to prepare his complaint, answer, reply, or demurrer, to which he was entitled at the making of the order." Such order, therefore, operates as a positive stay of proceedings, and extension of the time to plead, pending its operation. The same may possibly be held with reference to the demand of a bill of particulars, though, in this case, until the point is definitely settled, it will be more prudent to obtain an extension by order.

*Computation of Time; from, and to what Periods.*—With reference to the mode in which the twenty days allowed to plead, and any extensions, are to be computed, provision is made by sec. 407, which runs as follows :

§ 407. The time within which an act is to be done, as herein pro-

vided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

This provision, being of general application, has been already fully considered, and the cases generally applicable cited, under the head of Formal Proceedings. It is clearly settled that, with reference to the limitation of time in all cases, the party has the whole of the last day to perform the act required; so that, for instance, where the summons and complaint are served on the first of the month, the defendant will have the whole of the 21st in which to plead: but, if he omit to do so on that day, the plaintiff may take his default on the morning of the 22d. See *Schenck v. McKie*, 4 How. 246, 3 C. R. 24; *Truax v. Clute*, 7 L. O. 163; *Judd v. Fulton*, 4 How. 298, 10 Barb. 117; and other cases there cited. See also *O'Brien v. Cutlin*, 1 C. R. (N. S.) 273.

The possible effect of service by mail, in doubling the time to plead, in cases where it is admissible, must not be lost sight of. See this subject treated heretofore, and the various cases cited in sec. 55 under the head of Service by Mail.

Where the summons was served separately, and a copy of the complaint afterwards delivered to the defendant, but not on his demand, and merely as part of the proceedings on an arrest, it was held that the time to answer ran from the service of the summons, not of the complaint, and a judgment entered on the expiration of the former period, was held to be regular. *Van Pelt v. Boyer*, 7 How. 325.

In relation to the time which will be allowed in cases of service by publication, see that subject heretofore treated under the head of Summons. The safer course for a defendant will be to adopt the view taken in *Dykers v. Woodward*, there cited; though whether that view is sustainable seems more than doubtful; and to arrange, if possible, to put in his answer, within twenty days after he receives actual notice of the summons; the safer course for the plaintiff, to defer entering his judgment until the publication is complete, at all events, if not till twenty days after such completion. See *Tomlinson v. Van Vechten*, there also cited, a case which seems to tend in the opposite direction. The time of actual completion of service seems to be the preferable period, as the defendant's rights to come in and defend afterwards are fully saved by the Code, and there

seems no adequate reason why the plaintiff's proceedings should be hung up for any longer period than the six weeks required by the section in question.

*Extension of Time by Consent.*—If the party, or his attorney, from any reason, finds himself unable to prepare his pleading within the time allowed by the above sections, the usual course is to apply to the adverse attorney for a consent enlarging the time, unless, for other reasons, the request be unadvisable. This consent must, of course, be in writing, and signed by such attorney, or else, under Rule 37 of the Supreme Court, it will not be binding; but, within these conditions, no particular form is necessary. The party obtaining it will, of course, take care that the period allowed is distinctly expressed, and that the cause in which the consent is given, is distinctly referred to.

*Extension of Time by Order.*—If, for any reason, this course be unadvisable, or if time be refused, application may then be made for an order extending the time to plead. This proceeding is specially provided for by sec. 405 of the Code, which runs as follows :

§ 405. The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor, by a judge of the court, or, if the action be in the Supreme Court, by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

This provision is, as will be seen, general ; and, in its other aspects, will be hereafter considered. Under the powers here conferred, in connection with those of sec. 401, and the other provisions before referred to, (particularly in the introductory chapters relative to the jurisdiction of the Supreme Court,) any judge of that court, or any county judge, in any part of the State, (the latter, of course, within the limits of his jurisdiction,) may make orders of this description, in suits falling within his cognizance, without reference to the district in which the cause is actually pending.

In *Wilcock v. Curtis*, 1 C. R. 96, it was held that the restriction in sec. 401, that "no order to stay proceedings, for a longer time than twenty days, shall be granted by a judge out of court,

except upon previous notice to the adverse party," did not comprise an order extending the time to answer, inasmuch as it did not effect a general stay; and this case does not appear to have been directly overruled. The doctrine is one, however, not to be depended upon. A practice sprung up, instead, of obtaining *ex parte* a series of twenty-day orders, where more than the original period was required; but, in several recent cases, this mode of proceeding has been held irregular. The only safe course of proceeding will be to answer within the original period, if possible; if not, to obtain an *ex parte* extension for twenty days, and, if that period should not be sufficient, then to apply to the court, on notice, for such further period as may be actually requisite. See this subject heretofore treated, and various cases cited in sec. 64, under the head of *Ex parte* Motions.

The application for an order of this nature is, in the first instance, strictly *ex parte*, and must be made on affidavit, either of the party or his attorney. The managing clerk of the latter will also, in most cases, be competent to make it. To give any positive form for the affidavit would be superfluous, since in no two cases is it probable that the circumstances will be exactly alike. The following general observations seem, however, to be applicable:

1. The date at which the current time expires, either with reference to the original service of the summons, or the expiration of the last extension granted, should be stated; and, under the latter circumstances, the fact that the time has already been extended must appear, or the court will feel strongly disposed in favor of granting an application to vacate the order, unless it be clearly shown that such omission was not made with any view to concealment or misrepresentation.

2. The circumstances under which the indulgence is required, should be clearly, though concisely shown, care being taken by the party swearing to the affidavit, to lay bare his own case as little as possible, whilst stating enough to induce the court to act.

The order obtained on this application is generally endorsed on the affidavit, and in such case, runs merely in the words, or to the effect, "let the defendant A. B. have      days additional time to answer in the cause," the date being added. An order in this form extends the time to demur. See *Brodhead v. Brodhead*, 4 How. 308, 3 C. R. 8. Of course, when the order

is for time to reply, this wording must be changed. The judge's signature being obtained to this memorandum, a copy of it, and also of the affidavit on which it was granted, (which last is indispensable,) must be served on the opposite party, and then the proceeding is complete. Neither order nor affidavit need be filed, or entered with the clerk of the court. See *Savage v. Relyea*, 3 How. 276; 1 C. R. 42. In *Schenck v. McKie*, 4 How. 246, 3 C. R. 24, it was held that an order, granting additional time to answer, does not commence to run until the then current time shall have expired. The order in that case was made on the 1st, but the time to answer expired on the 8th October, and it was held that such order, nevertheless, extended the time till the 28th.

Of course, the above precautions, or one of them, must be taken before the time to plead has actually expired, and, at the very latest, on the last day allowed for that purpose. If delayed until afterwards, the application can no longer be made to the court *ex parte*. See *Snyder v. White*, 6 How. 321. The opposite party having then become actually entitled to take a default, that right cannot be properly taken from him, unless on an application on notice, either by way of motion or order to show cause. The latter will, probably, be found the most convenient course, an interim stay of proceedings being asked for as part of the order. The emergency is one, however, that ought never to occur, with proper vigilance.

It would seem from the case of *The Columbus Insurance Company v. Force*, 8 How. 353, that an extension of the time to answer does not, *per se*, deprive the defendant of his right to object to the legality of an arrest, though any laches on his part will, doubtless, do so. An extension of the time to answer is, however, a waiver of all objections to the complaint, and a bar to the defendant's right to move to strike out irrelevant matter, unless the right to make the motion is expressly given. *Bowman v. Sheldon*, 5 Sandf. 651, 10 L. O. 338; *Hollister v. Livingston*, 9 How. 141.

*Extension of Time, by Effect of Amendment.*—Lastly, in relation to the time allowed to plead, the effect of an amendment by the adverse party must not be forgotten. The consequence of such an amendment is, to establish a new period altogether, in lieu of that current before the service of the amended pleading.

The time will then run in the usual manner, as from the date of such service, without any reference whatever to the proceedings prior thereto. See this subject previously considered, and the cases thereon cited in sections 114 and 116, under the head of Amendments as of course, or by leave of the court.

### § 145. *Relief where Default suffered.*

Positive as is, in terms, the limitation on pleading imposed by the above provisions, the courts have throughout shown a very strong disposition to relax the strictness of this rule in practice, though, of course, only upon the existence of a *bona fide* defence being shown, and on conditions imposed. The following general principle runs, too, through all the cases upon the subject, *i. e.*, that, where a defendant, already in default, applies for leave to be allowed to come in and defend, his proposed answer should be drawn and sworn to, and a copy thereof served, with the notice of motion or order to show cause by which such relief is asked: in order that the court may judge, as to whether the case is a proper one in which to grant relief of that nature, and as to the proper terms to be imposed, as conditions on granting it. See this last principle, as held under the old practice, in *McGuffigan v. Jenkins*, 1 Barb. 31.

The earliest case on the above subject, as applicable to proceedings under the Code, is *Lynde v. Verity*, 3 How. 350, 1 C. R. 97, where the whole of the different principles, as above stated, are distinctly laid down. In *Salutat v. Downes*, 1 C. R. 120, the same indulgence was granted, after a discussion as to whether the court had, or had not, power to enlarge the time at all. By *Allen v. Ackley*, however, 4 How. 5, the doctrine was carried to the fullest extent, two defendants having, in that case, been let in to defend, after judgment had been taken against them by default; one of them only making what the court pronounced to be a lame excuse for not answering, and the other making no excuse at all. The court, however, imposed strict terms and conditions; in particular, that the Statute of Limitations should not be pleaded, and also that the judgment should stand as a security to the plaintiff.

In *Grant v. McCoughin*, 4 How. 216, the defendant was allowed to come in and defend, after judgment had been entered



against him, in consequence of a misapprehension, as to the effect of a stipulation given, extending his time to answer; and, under these circumstances, the court, though enforcing the payment of costs, and directing the judgment to stand as security, refused to impose any condition as to the nature of the defence sought to be set up, which in that case was usury.

Where, however, an unconscientious or dishonest defence is sought to be set up, after default, the court will not open that default, or relieve the party from the consequences of his own neglect. See *James G. King v. The Merchants' Exchange Company*, 2 Sandf. 693.

In *Foster v. Udell*, 2 C. R. 30, the New York Common Pleas decided that a delay on the part of the plaintiff in taking judgment, was equivalent to a consent to give the defendant further time to answer; and they set aside, as irregular, a judgment so obtained; the defendant, long after his time had expired, but before judgment was entered, having served an answer, but which the plaintiff's attorney had refused to receive. The doctrine of this case has, however, been since overruled. A decision exactly contrary to it was given by the Supreme Court, in the case of *Dudley v. Hubbard*, 2 C. R. 70; and a motion to set aside a judgment thus entered, was denied, with costs. In *McGown v. Leavenworth*, 3 C. R. 151, the same principle is laid down; and this, being a decision of the general term of the same court by which *Foster v. Udell* was decided, directly overrules it. It was also held, in the same case, that an order staying the plaintiff's proceedings, does not, *per se*, enlarge the defendant's time to answer. It can only be so by order specially obtained for that purpose. The stay of proceedings only precludes the plaintiff from taking advantage of the omission, until that stay is vacated, or at an end. The defendant had there, on the last day, obtained an order to show cause why he should not have further time to plead, with an interim stay of proceedings as usual, which order was discharged on the return. Pending that stay, but after the time actually allowed had expired, the defendant had served his answer, which service was held to be irregular, and was set aside.

In *Mandeville v. Winne*, 5 How. 461, 1 C. R. (N. S.) 161, the doctrine of the above cases, and particularly as laid down in *Dudley v. Hubbard*, was distinctly confirmed; and the same seems to be implied in *Graham v. McCoun*, 5 How. 353; 1 C. R.

(N. S.) 43. It may, therefore, be looked upon as settled, that, if the defendant allow his time to plead to go by without obtaining an extension, he cannot afterwards serve his pleading, in ordinary form, or without leave of the court, specially obtained on notice to the plaintiff; and this, although the latter may not at the time have taken any steps to avail himself of the default suffered. See, likewise, *O'Brien v. Cutlin*, 1 C. R. (N. S.) 273. Of course, however, if the plaintiff's solicitor expressly receive, or do not return the pleading thus irregularly served, within a reasonable time, the defect will then be waived, and the answer may be sufficient. See introductory chapter on formal requisites of pleading, and various cases, including *Laimbeer v. Allen*, 2 Sandf. 648; 2 C. R. 15, there cited. The same, too, is implied in *McGown v. Leavenworth*, above mentioned; and a return within the same day in which the pleading was served, was held to be a reasonable time.

The plaintiff, too, cannot take advantage of a default occasioned by the laches or bad faith of his own attorney, where the defendant's pleading has been ready, and attempted to be served within due time. Thus, in *Falconer v. Uccopel*, 2 C. R. 71, on the last day of service, the defendant endeavored, in office hours, to serve his answer at the plaintiff's office, and also at his dwelling, but both were closed, and no one was there to receive it; but, on the following day, such defendant succeeded in serving the answer on the plaintiff personally, with notice of the attempted service on the day before: under which circumstances it was held that the service was regular, and costs were given.

## CHAPTER III.

### DEMURRER.

#### § 146. *General Nature and Office of Demurrer.*

THE office of this species of pleading is the formal impeachment of defects in the plaintiff's case, apparent upon his own

showing. It is, therefore, a measure of comparative infrequency, as, in a well-drawn pleading, it rarely happens that any such salient points of attack are left uncovered. If the defects objected to require any statement or proof of facts to make them apparent, demurrer will not lie. The objection, in that case, can only be taken by answer, and the defendant's rights, in that respect, are specially saved by section 147. In practice, therefore, this will be the most usual course.

In *Humphreys v. Chamberlain*, 1 C. R. (N. S.) 387, it was accordingly held that a demurrer to an action on a contract, on the ground that such contract was void by the laws of the State in which it was made, was bad, and that the objection could only be taken by answer; inasmuch as the contents of foreign statutes are a matter of evidence, which must be set up in the pleadings as a fact, and proved at the trial accordingly.

In *Carroll v. Carroll*, 11 Barb. 293, the rule is laid down thus: "A demurrer must generally depend on that which appears on the complaint, and not on that *quod non constat*, unless this last is essential to a *prima facie* cause of action."

In *Getty v. Hudson River Railroad Company*, 8 How. 177, it is also laid down that a demurrer is only appropriate, when the ground of objection appears on the face of the pleading demurred to. The same doctrine, and that, where such is the case, the objection on that ground can only be taken by answer, is distinctly laid down in *The Union Mutual Insurance Company v. Osgood*, 1 Duer, 707.

Where the complaint in an action showed a title to sue, but contained insufficient averments on the subject of that title, answer, not demurrer, was held to be the proper form of raising the question. *Millard v. Shaw*, 4 How. 137.

Demurrer will only lie to an entire pleading, or to an entire cause of action, or ground of defence therein stated. Redundant or immaterial matter, of which a portion is relevant, cannot be so impeached; the proper course in such cases is a motion to strike out such matter. See this subject very fully considered, and numerous cases in point cited, in a prior chapter, under the head of Correction of Pleadings, on motion of the adverse party.

The converse of this proposition is equally true, and, wherever the pleading itself, or any separate statement of a cause of

action, or a ground of defence, is irrelevant, as a whole, and not in part only, the proper mode of raising the question will be by demurrer, and not by motion. *White v. Kidd*, 4 How. 68; *Fabbricotti v. Launitz*, 3 Sandf. 743; 1 C. R. (N. S.) 121; *Benedict v. Dake*, 6 How. 352; *Nichols v. Jones*, 6 How. 355; *Belden v. Knowlton*, Superior Court, unreported; *Harlow v. Hamilton*, 6 How. 475; *Seward v. Miller*, 6 How. 312; *Salinger v. Lusk*, 7 How. 430; *Bailey v. Easterly*, 7 How. 495; *Miln v. Vose*, 4 Sandf. 660; *Reed v. Latson*, 15 Barb. 9; *Scovell v. Howell*, 2 C. R. 33; *Bedell v. Stickles*, 4 How. 432; 3 C. R. 105; all before noticed, in the chapter last referred to. See, likewise, decision of New York Common Pleas, in *Brien v. Clay*, a case of mechanic's lien, published by the clerk of that court. See also *Van Namee v. Peoble*, 9 How. 198. In relation to insufficient statements, demurrer is the proper course. *Hoxie v. Cushman*, 7 L. O. 149.

A defect in the complaint demurred to, must be made clearly apparent. Where a complaint was objected to, on the ground that it did not show affirmatively that the debt sued for was due when the action was commenced, the court refused to infer that such was not the case, for the purpose of supporting a demurrer. The presumption, if any, would lie the other way. *Maynard v. Talcott*, 11 Barb. 569. See *Foster v. Hazen*, 12 Barb. 547, as to a similar presumption, in favor of the regularity of the proceedings of an inferior court. Nor will a demurrer, as a general rule, be sustained on a matter of mere form, if there are any merits in the case. *Howell v. Fraser*, 6 How. 221; 1 C. R. (N. S.) 270.

Where a portion of a pleading was sufficient, a demurrer to the whole was held too broad, and overruled, in *Cooper v. Clason*, 1 C. R. (N. S.) 347. See, also, *Newman v. Otto*, 10 L. O. 14, 4 Sandf. 668. Where, however, a demurrer was sufficiently broad in part, other portions of it, objecting to irrelevant matter, and therefore in themselves inadmissible, were refused to be stricken out. *Smith v. Brown*, 6 How. 383.

In *Bale v. Hughes*, 5 Sandf. 640, 10 L. O. 66, the fact that the plaintiff demanded judgment for a larger amount than, by his own showing, he was entitled to recover, was held not to be a ground of demurrer. Nor will unnecessary prolixity in the plaintiff's statement be so. *Johnson v. Snyder*, 7 How. 395.

The demurrer and answer are essentially separate pleadings, and do not lose their distinctive character by being made out

in one paper, and connected in form. See *Howard v. The Michigan Southern Railroad Company*, 5 How. 206, 3 C. R. 213, below cited.

This form of pleading was held by the New York Common Pleas to be applicable to proceedings under the Mechanics' Lien Law, where otherwise appropriate. See *Doughty v. Develin*, decision published by the clerk of that court.

The demurrer under the Code, coupled with the provisions for striking out irrelevant matter, have swept away entirely the old chancery practice of exceptions. *Boyce v. Brown*, 7 Barb. 80; 3 How. 391; *Cobb v. Frazee*, 4 How. 413; 3 C. R. 43. It is a new species of pleading, created, and its character and office defined by the Code, and the old rules on the subject exist no longer. Many objections under the old practice are now no longer cognizable, whilst many others, which formerly were waived, unless pleaded in abatement, can now be taken by means of this pleading. *Swift v. De Witt*, 3 How. 280; 1 C. R. 25; 6 L. O. 314; *Manchester v. Storrs*, 3 How. 401.

The old rules on the subject of the effect of a demurrer, as necessarily involving an admission of the facts of the plaintiff's case, hold good under the Code. Thus, in *Hall v. Bartlett*, 9 Barb. 297, it is held that "a demurrer admits the facts which are relevant and well pleaded, but not conclusions of law. *Ford v. Peering*, 1 Ves. Jun. 71, Story's Pl. 452, and the cases there cited." The purchase of a mortgage by an attorney, followed up by proceedings on his part to foreclose by advertisement, was held not to be a purchase with intent to sue, within the meaning of 2 R. S. 288, sec. 71, and judgment was given for him accordingly, on his demurrer on that ground. See likewise as to the necessity of the fact, out of which the demurrer arises, being admitted, *Clark v. Van Deusen*, 3 C. R. 219.

In *Fry v. Bennett*, 5 Sandf. 54; 9 L. O. 330, 1 C. R. (N. S.) 238, although, strictly speaking, a demurrer to answer, several important principles are laid down, in reference to the law of demurrer in general. They are as follows: Mere irrelevancy or surplusage are not, as above stated, legitimate grounds of demurrer. Malice, in libel, on a publication libellous on its face, is a conclusion in law; unless where the publication would be privileged, if not in fact malicious. So, likewise, with respect to inuendoes, the sole office of which is explanation. On neither of the above can material issues be raised; but the latter, when

improperly framed, may, in some cases, justify a demurrer. The principle is laid down, that "an answer is insufficient, in the sense of the Code, and, therefore, bad upon demurrer, not only when it sets up a defence groundless in law, but when, in the mode of stating a defence, otherwise valid, it violates the essential rules of pleading, which the Code has retained;" and, doubtless, the same principles would be held, in relation to averments of a cause of action. Whether a publication, libellous on its face, may be excused as privileged, is a question of law that may properly be raised by demurrer. Where, however, privilege is claimed, on the ground that the animadversions complained of were fair and legitimate criticism, the defences of truth and privilege are inseparable; and, if justification be not duly pleaded, privilege cannot be so. Justification, and matter in mitigation, are likewise inseparable as defences, and if the latter be pleaded without the former, demurrer will lie. See citation of this case hereafter, under the head of Answer. Although, as a general rule, a demurrer must cover the whole of the pleading demurred to, it need not do so with respect to matter raising immaterial issues, such as on malice, or inuendo, as above stated; and only those allegations in a complaint are to be deemed material in the sense of the Code, which the plaintiff must prove upon the trial, in order to maintain his action. A demurrer, omitting to notice allegations of the above nature, was accordingly there sustained.

A demurrer to the Code itself, as unconstitutional, inasmuch as it abolished the distinction between law and equity, has been, as might have been expected, overruled as frivolous. *Anon.*, 1 C. R. 49.

### 147. *Grounds of Demurrer under Code.*

*General Provisions.*—The points on which demurrer will lie, and the nature of that pleading in general, are strictly defined by sections 144 and 145 of the Code, which run as follows:

§ 144. The defendant may demur to the complaint, when it shall appear upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant ; or,
5. That several causes of action have been improperly united ; or,
6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 145. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

It follows, as a matter of course, that no description of objection which does not fall within one or other of the foregoing classes, will now form ground of demurrer.

Distinctness in stating the grounds of demurrer, is, as will be seen, made a positive requisite by sec. 145. The observations in a foregoing chapter, in reference to making use of the exact words of any statutory provision, are peculiarly applicable to demurrer ; in framing which, the precise phraseology of the subdivision of sec. 144, under which the objection is taken, should, on no account, be omitted in any instance, either as preliminary to the statement of the different special grounds, or as part of that statement. See form in Appendix.

It is now provided by Rule 87, inserted on the last revision, that, in all cases of more than one distinct cause of defence, the same shall not only be separately stated, but plainly numbered. This provision should be attended to in the statement of grounds of demurrer.

We now proceed to take up the different causes of demurrer, as prescribed by section 144, *seriatim*, and in their order.

1. *Want of Jurisdiction.*—The objection to the jurisdiction of the court must be substantial, not formal, and must arise upon the pleading itself demurred to, and not under facts extrinsic to that pleading. Where, therefore, the summons had been improperly served, a demurrer that the court had no jurisdiction of the person of the defendant was overruled. The proper course for him to have pursued on such occasion was, to have moved to set the service aside for irregularity. *Nones v. The Hope Mutual Insurance Company*, 8 Barb. 541 ; 5 How. 96 ; 3 C. R. 161.

An objection of this description must be fully made out. The court will not assume the existence of facts not actually alleged, in order to render void the proceedings of an inferior tribunal ; nor will any presumption be indulged in such a case

to oust the jurisdiction of such tribunal, where enough is shown to bring the case within the general language of the statute which confers it. *Foster v. Hazen*, 12 Barb. 547. Jurisdiction is intended of the judgments of the United States courts, without specific allegation. *Bement v. Wisner*, 1 C. R. (N. S.) 143.

A demurrer on the above ground is, doubtless, the proper course to be adopted, in taking objections on the ground of personal privilege, as in the case of ambassadors, consuls, &c., exempted from suit in the State courts, in cases where that privilege is apparent on the plaintiff's own showing. If otherwise, demurrer by answer will be the proper course to pursue.

In *Flynn v. Sloughton*, 5 Barb. 115, it was held that the privilege of a foreign consul to be exempt from suit in the State courts, might be waived by an answer to the merits. See, however, previous remarks on this decision, which seems to be clearly wrong, and to be overruled by the cases before cited under the head of Parties.

The case of *Hodgman v. The Western Railroad Company*, 7 How. 492, with reference to a cause of action in tort not being assignable, so as to enable the assignee to maintain an action, seems to bear on this head, though the demurrer was there taken under subdivision 6.

2. *Want of Capacity to sue.*—This subject has been in a great measure anticipated in a previous chapter, under the head of Parties.

A demurrer on this ground was sustained in *Fitzhugh v. Wilcox*, 12 Barb. 238, in relation to the contracts of a lunatic, and an attempt of his committee to sue thereon, without the special direction of the court; and, likewise, in *Hall v. Taylor*, 8 How. 428, in relation to a legal action, brought, in like manner, by the creditor of an habitual drunkard against his committee.

In *Stryker v. Lynch*, 11 L. O. 116, it was held that the plaintiff in partition must be in actual or constructive possession of his share of the subject-matter of the suit; and that, where the complaint shows the legal title to be in a third person as trustee, the defect will be fatal.

See this subject previously considered in the chapter on complaint, under the head of the Plaintiff's Right to sue.

*Autre Action pendant.*—Subdivision 3, is equivalent to the



former plea of *autre action pendant*. It will rarely happen, however, that demurrer pure will be the proper remedy in this case. Unless the fact of such other action pending appear by the complaint, a specific averment will be requisite, and demurrer by answer will then be the proper form. See *Hornfuger v. Hornfuger*, 6 How. 279, 1 C. R. (N. S.) 412.

To be pleadable in bar, in either of these modes, the action forming the subject of that pleading, must be pending in some other court of the same State. Another action, for the same cause in the courts of another State, constitutes no bar. *Burrowes v. Miller*, 2 C. R. 101; 5 How. 51. "The intention of subdivision 3, of sec. 144, was merely to affect the form of asserting a defence already available by law, and not to alter the nature of such defence."

The defendant is not, however, remediless in this last matter. The court will, in a clear case, prevent oppression, by forcing the plaintiff to elect in which action he will proceed, and will suspend proceedings until he has done so. *Hammond v. Baker*, 3 Sandf. 704; 1 C. R. (N. S.) 105. Jurisdiction being intended of the judgments of the United States' courts, (see *Bement v. Wisner*, 1 C. R. (N. S.) 143,) it might probably be held that the plea of another action, pending in those courts, in whatever district of the United States, would be sufficient.

*Defect of Parties.*—The subject of nonjoinder of parties has been anticipated in the previous chapter, under the heads of Parties and Complaint.

In cases of demurrer on this ground, the first clause of section 122, or, rather, the whole of that section as it stood in the Code of 1849, will be held to be the controlling provision. Where the court cannot determine the controversy before it, without prejudice to the rights of others, or by saving those rights, demurrer will lie, and the court must cause those parties to be brought in. If the contrary be the case, and the controversy can be decided as above, the demurrer will not be well taken. *Wallace v. Eaton*, 5 How. 99; 3 C. R. 161.

A demurrer on this ground will not lie for an excess of parties, but only for a deficiency. *Stryker v. Lynch*, 11 L. O. 116.

*Misjoinder of Causes of Action.*—The improper joinder of causes of action, is a defect which must be carefully avoided.

In respect to matters of this nature, sec. 167 is the controlling provision. This question has been already very fully considered, and numerous cases cited, under the head of Joinder in the chapter on Complaint, to which, therefore, the reader is referred.

Where objection is taken to the complaint on this ground, demurrer, not motion, is the proper remedy. *Stannard v. Mattice*, 7 How. 5. See *Bailey v. Easterly*, 7 How. 495.

The objection of improper joinder of causes of action is, however, of wider scope, and will include the mixing up of different causes of action of the same class, in one general statement. See this subject also heretofore considered, and several cases cited, in the chapter on Complaint, under the head of Joinder, and in that as to the essential requisites of pleading.

In accordance with this principle, it was held in *The Ogdensburgh Bank v. Paige*, 2 C. R. 75, that where, by the complaint, several distinct acts were separately averred, in support of the same cause of action, separate demurrers might be interposed to each of such averments.

6. *Insufficiency.*—The consideration of this head has been anticipated, and the numerous cases in point cited in the chapter devoted to the consideration of complaint. See that chapter, *passim*, and especially under the heads of the Plaintiff's Right to sue, and Averments in Complaint, generally and specially considered.

### § 148. *Mode of Statement of Grounds as above.*

The point as to whether a demurrer, simply following the words of the statute, is, or is not, a sufficient pleading, has given rise to considerable and somewhat doubtful discussion.

A general demurrer, objecting only, "That the complaint does not state facts sufficient to constitute a cause of action," has been objected to and held bad on the ground that, to render a demurrer valid, it must, under sec. 145, distinctly specify the grounds of objection, so as to enable the opposing party to ascertain what is the alleged omission or defect complained of, in order that, if thought fit, he may amend. *Grant v. Lasher*, 2 C. R. 2; *Hunter v. Frisbee*, 2 C. R. 59, 7 L. O. 319; *White v. Low*, 7 Barb. 201; *Glenny v. Hitchins*, 4 How. 98; 2

C. R. 56, and *Swift v. Dewitt*, 3 How. 280; 1 C. R. 25; 6 L. O. 314. And this same view has been strenuously supported in the more recent cases of *Purdy v. Carpenter*, 6 How. 361, and *Hinds v. Tweddle*, 7 How. 278, the last being, however, a case of demurrer for misjoinder.

In *Swift v. Dewitt*, however, above noticed, the learned judge doubted whether a specification of the above nature could or ought to be required in all cases, and stated, he was inclined to think it was enough to state that the complaint did not show a sufficient cause of action.

In *Durkee v. The Saratoga and Washington Railroad Company*, 4 How. 226, the above doubt was adopted, and fully confirmed; and it was distinctly and positively held, that the objection in question was well raised, by a demurrer which merely specified that ground of objection in the words of the statute. This doctrine is absolutely confirmed by *Johnson v. Wetmore*, 12 Barb. 433; *Dauchy v. Bennett*, 7 How. 375; *Hoogland v. Hudson*, 8 How. 343; *Getty v. The Hudson River Railroad Company*, 8 How. 177, and likewise by the Court of Appeals in *Haire v. Baker*, 1 Seld. 357. It is also supported, with reference to demurrer to answer, by *Hyde v. Conrad*, 5 How. 112, 3 C. R. 162; *Anibal v. Hunter*, 6 How. 255, 1 C. R. (N. S.) 403; *Arthur v. Brooks*, 14 Barb. 533, and *Noxon v. Bentley*, 7 How. 316. The authority of these cases seems to be preponderating, and to settle the question that a demurrer for insufficiency, under sec. 144, subdivision 6, can properly be taken in the words of the statute, without further specification.

In *Getty v. The Hudson River Railroad Company*, above cited, an exception was made, in favor of demurrers for want of jurisdiction and defect of parties, as to which, it was considered, that a further specification ought to be made, so far as to point out, in the former case, whether the alleged want of jurisdiction related to the person of the defendant, or the subject of the action; and, in the latter, whether the defect of parties complained of was in respect of parties plaintiff, or defendant; it being held, as above, that, in all other cases, a statement in the words of the statute is sufficient. In the same case it is laid down, that it is enough to sustain a demurrer, if any of the objections specified appear on the face of the complaint. Although the point seems thus definitively settled, it may nevertheless be not inexpedient, to state shortly, upon the face of the

demurrer, the points on which it is contended that the complaint does not show a sufficient cause of action, taking care to raise every objection which can be properly taken. See *Kneiss v. Seligman*, below cited. No inconvenience whatever can result from this practice, which will, moreover, be more consonant with the principles laid down by the framers of the statute, in their report, p. 141, viz., "that the defendant shall, by his answer, point out his defence distinctly." In the districts in which an adverse view on the question of a general demurrer has been recently held, this may be especially advisable, though perhaps not necessary.

### § 149. *Omission to demur.*

The demurrer must not only distinctly specify the grounds of objection to the complaint, but, if any such ground be omitted, it cannot afterwards be taken on the argument. There can be no doubt but that the principle laid down in this respect in *Kneiss v. Seligman*, 5 How. 425, 8 Barb. 439, is sound, although that case more directly refers to demurrer to answer. This latter subject will be treated of hereafter, in the chapter devoted to the consideration of reply.

Provision is, in fact, expressly made by sec. 148, that any objections to the complaint, not expressly taken either by demurrer or answer, will be deemed to be waived, excepting only those to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of action. These two objections may be asserted for the first time, at any period during the progress of the cause, even on an appeal to the general term against a judgment entered under sec. 247; although in this last case, a defendant cannot take a judgment in his favor, having failed to raise the objection in proper time and form for that purpose. *Raynor v. Clark*, 7 Barb. 581; 3 C. R. 230.

Objections as to insufficiency or defect in the complaint, must, however, be asserted in due form, and in due time. Thus, where a defendant had failed to demur on the ground of an evident defect in the complaint, or to object to the evidence offered thereon before the referee to whom the cause was referred, or to except to that referee's decision; it was held that he could not raise the objection, on the hearing of a case for the

review of the latter's report. It was not properly before the court at that time. *Carley v. Wilkins*, 6 Barb. 557.

In *Ludington v. Taft*, 10 Barb. 447, the doctrine that the objection for insufficiency is not waived by an omission to take it on the pleadings, is maintained. It is held, however, that, under such circumstances, the question will be, not whether the complaint is perfect, and embraces all necessary matters, but only, whether there are facts enough set forth to show a cause of action.

In *Spencer v. Wheelock*, 11 L. O. 329, it was considered that an objection, that parties, severally liable, under different contracts, were jointly sued, fell under the head of insufficiency, as against the defendants, in the form in which they were sued, not under those of misjoinder, or of defect of parties, and therefore, that such objection was not waived by the omission to demur. This case seems, however, adverse to those next cited, and also to *White v. Low*, 7 Barb. 204, and *Montgomery County Bank v. Albany City Bank*, 8 Barb. 396.

In *Ingraham v. Baldwin*, 12 Barb. 9, it was held that the objection of the improper joinder of parties plaintiffs, will be waived by an omission to demur.

In *King v. Vanderbilt*, 7 How. 385, it was likewise held, that the nonjoinder of defendants was waived by such an omission. See also *Gardner v. Clark*, 6 How. 449, in relation to the waiver of a plea in abatement, by answering to the merits. See likewise *Howland v. Fort Edward Paper Mill Company*, 8 How. 505; *Tripp v. Riley*, 15 Barb. 333; *Dennison v. Dennison*, 9 How. 246.

### § 150. *Demurrer and Answer, how far admissible in connection.*

By sec. 151, it is provided that "the defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue." This provision was not in the Code of 1848, and, accordingly, the case of *Manchester v. Storrs*, 3 How. 401, which held that a demurrer could only be interposed to the entire complaint, is no longer applicable to the existing practice.

The question as to how far a defendant may both demur and answer to the same ground of complaint, has been the subject of contradictory decisions. The cases of *The People ex rel. Fal-*

*coner v. Meyer*, 2 C. R. 49, and *Gilbert v. Davies*, 2 C. R. 50, are authority in favor of his right to do so; but, in *Slocum v. Wheeler*, 4 How. 373, it was held, on the other hand, that a defendant cannot both demur and answer, at the same time, to a single cause of action, and the two last cases are both commented upon and formally overruled. In *Spellman v. Wieder*, 5 How. 5, the same doctrine was positively held, and the authority of *Slocum v. Wheeler* confirmed in terms, in a case where the defendants had both demurred and answered to the whole complaint. A like decision was come to in *Cobb v. Frazee*, 4 How. 413, 3 C. R. 43, (a demurrer to answer,) where it was held that demurrer will not lie to part of an entire defence. The plaintiff had, in that case, selected from the answer several sentences, forming a part of one entire ground of defence, and demurred thereto, replying to the residue, under which circumstances his demurrer was overruled. Similar views were laid down in *Howard v. The Michigan Southern Railroad Company*, 5 How. 206, 3 C. R. 213, where the defendant had both demurred and answered to the complaint; but it was held that the plaintiff could not treat such pleading as a nullity, or move for judgment; but should move to strike out the answer and demurrer, or that the defendant elect by which he will abide: and the like doctrine is implied in *Clark v. Van Deusen*, 3 C. R. 219. It is also reasserted in the most positive terms, and the authority of *Slocum v. Wheeler*, *Spellman v. Wieder*, and *Cobb v. Frazee*, fully confirmed, in the more recent case of *Ingraham v. Baldwin*, 12 Barb. 9, and the point may therefore be looked upon as settled accordingly.

Where, however, the causes of action in a complaint, or the defences in an answer, are separately stated, in compliance with the directions to that effect in secs. 167 and 150, there can be no doubt that the opposing party may both demur, and also answer or reply by the same pleading: provided he does not do both to the same ground of action or defence, but separates, on the contrary, his objections or answers to his adversary's pleading, into distinct classes, in the same manner in which the grounds of action or defence in that pleading have been separated.

### § 151. *Frivolous Demurrer.*

Demurrer, with all its advantages, is, however, a proceeding

attended with some risk, as, if it be adjudged to be clearly frivolous, and to have been put in for the purposes of delay, leave to answer may be, and has been, in many cases, refused.

A demurrer for misjoinder of both husband and wife as parties, in a case where it appeared that both had actual, though different interests, in the subject-matter of the action, was accordingly stricken out as frivolous, and judgment given for the plaintiff, in *Conde v. Shepard*, 4 How. 75; 2 C. R. 58, (as *Conde v. Nelson*.)

A demurrer on the ground that profert of his letters of administration was not made by an administrator suing as such, was stricken out as frivolous, in *Bright v. Currie*, 5 Sandf. 433, 10 L. O. 104. See also, *Welles v. Webster*, 9 How. 251.

In an action brought by a bank, on a note payable to the order of their cashier, a demurrer that such action was not brought by the proper party having been taken, it was held that the plaintiffs were entitled to judgment, on account of its frivolousness, though leave was given to the defendants to answer on terms. *The Camden Bank v. Rodgers*, 4 How. 63; 2 C. R. 45.

Where the plaintiffs sued in a corporate name, a demurrer on the ground that the complaint contained no averment that they sued as a corporation, was adjudged frivolous, but leave given to defend, on service of an affidavit of merits. *The Union Mutual Insurance Company v. Osgood*, 1 Duer, 707.

An omission to aver a default in the purchaser of goods intrusted to a commission merchant for sale and collection, in an action against the latter, on his guaranty, was held not to be a ground of demurrer, the complaint averring that the amount was due from him. *Milliken v. Byerly*, 6 How. 214.

A demurrer that the complaint in an action for goods sold and delivered, did not state any legal liability, or any promise to pay, was in like manner held to be frivolous, and judgment given for the plaintiff, in *Glenny v. Hitchins*, 4 How. 98; 2 C. R. 56.

In *Appleby v. Elkins*, 3 Sandf. 673, 2 C. R. 80, where the complaint stated the making, endorsement, and delivery of a promissory note to the plaintiff, the non-payment thereof when due, and the defendant's indebtedness—a demurrer that the complaint did not show the plaintiff to be owner, or that the note was due, was stricken out as frivolous, and leave to answer

denied, there being no affidavit of merits. An omission to aver the fact of due protestation, in an action by endorsee against endorser, is, on the contrary, a demurrable defect. *Turner v. Comstock*, 1 C. R. 102; 7 L. O. 23.

In *Beach v. Gallup*, 2 C. R. 66, where the complaint alleged the plaintiffs to be holders of the note sued on, but did not aver ownership, or facts amounting thereto, a demurrer on the latter ground was refused to be stricken out; but, in the recent case of *Taylor v. Corbière*, 8 How. 385, the doctrine in *Beach v. Gallup* is disapproved, and that of *Appleby v. Elkins* confirmed. The latter may therefore be considered as the settled practice.

In *Radway v. Mather*, 5 Sandf. 654, a demurrer on the ground that the necessary allegations of presentment and notice were made on belief only, and not on information, was declared frivolous, both on the objection itself, and also because, if that objection had any force, it was not proper to be raised on demurrer.

It is only, however, in gross cases, that the court will feel disposed to exercise their summary power in the above respect. Thus, in *Neefus v. Kloppenburgh*, 2 C. R. 76, a demurrer to a complaint, alleging that "the defendant was indebted" to the plaintiff on an account for goods sold and delivered, on the ground that the conclusion of law, and not the facts, were pleaded, was likewise refused to be stricken out, and the general principle laid down, that it was only in cases where the demurrer was palpably groundless and untenable, and put in for the purposes of vexation and delay, that the court would exercise the power of expunging it from the record.

Similar principles are laid down in *Rae v. The Washington Mutual Insurance Company*, 6 How. 21, 1 C. R. (N. S.) 185, where it was held that, to warrant a judgment on a frivolous demurrer, "the case should be entirely clear, palpable on the statement of the facts, and requiring no argument to make it apparent;" and a motion to strike out a demurrer to the reply was accordingly denied, the questions raised being real and important.

If any portion of the demurrer be sustainable, the insertion of redundant or immaterial matter will not render it impeachable as a pleading, nor, it would seem, will such matter be even stricken out. *Smith v. Brown*, 6 How. 383.



### § 152. *Concluding Remarks.*

*Forms and Formal Proceedings.*—For form of demurrer, see Appendix.

This pleading requires no verification. It should, however, be signed by the attorney or counsel of the defendant, and a copy served upon the adverse party, in the usual manner.

*Demurrer by Answer.*—The subject of demurrer by answer, so far as relates to any independent considerations in relation thereto, will be treated of in a succeeding chapter.

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## CHAPTER IV.

### ANSWER.

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### § 153. *Office and Requisites of Answer.*

THE office of this most important pleading is, to present the case of the defendant, in opposition to that attempted to be made out by the plaintiff, upon the facts of the case alone, or upon the law and the facts conjointly, according to the circumstances. It is, accordingly, the form of defence most usually adopted.

The requisites of Answer are thus prescribed by the Code, in secs. 149 and 150:

§ 149. The answer of the defendant must contain,

1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter, constituting a defence or counter-claim, in ordinary and concise language, without repetition.

§ 150. The counter-claim mentioned in the last section, must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action, arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

The defendant may set forth, by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

These sections have been altered in several most important particulars, upon the recent amendment. The power of making a general as well as a specific denial of the plaintiff's allegations, existent under the Codes of 1848 and 1849, but abolished by that of 1851, is again restored; the power of joining legal and equitable defences in the same pleading, which had been, to some extent, a subject of doubt, is now expressly declared; and special provisions are made on the subject of counter-claim, the substituted definition for the formerly established term of set-off, which were not in the former measures. The phraseology of the sections is likewise altered in several comparatively unimportant particulars. The different cases bearing on the above subjects, will be cited in the course of the chapter.

The defendant has four courses open to him by means of an answer, when put in, any one or more of which he may adopt at his election, or all, if the circumstances admit.

1. He may demur to the complaint for defects in law, latent in that pleading itself, but made patent by statements contained in the answer.

2. He may put the plaintiff to proof of his case, by traversing the facts alleged.

3. He may present new matter, wholly or partially avoiding the plaintiff's claim.

4. He may seek to establish a counter-claim, either wholly or partially extinguishing the plaintiff's demand: which subjects will accordingly be treated of in the above order.

In certain cases a supplemental answer will be necessary, and, as such, allowable. See the subject hereafter fully considered in the concluding chapter of the present book, under the head of Revivor. See, also, *Drought v. Curtiss*, 8 How. 56, there cited.

### § 154. *Preliminary Considerations.*

*What may be an Answer.*.]—The following general considerations, however, demand notice in the first instance. In *Didier v. Warner*, 1 C. R. 42, it was laid down that a mere memorandum endorsed on the complaint, might possibly, in some cases, be held to be a sufficient answer. It is obvious, however, that the case is one "*sui generis*," and not a precedent to be followed under any circumstances.

*Objections not sustainable by Answer.*.]—Objections on the ground of irregular service of process, can neither be taken by answer nor demurrer; the only course open in such cases, is a motion to set aside such service for irregularity. See *Nones v. Hope Mutual Insurance Company*, 5 How. 96, 3 C. R. 161, 8 Barb. 541; *Bridge v. Payson*, 1 Duer, 614.

*Verification and other Formalities.*.]—This question has already been fully considered, and the cases in point cited, under the general head of Formal Requisites of Pleading. It may, however, be convenient to allude to one or two of them in this place, as more peculiarly applicable to this form of pleading.

Where two parties, severally interested, put in a joint answer, it must be verified by both, or it will be a nullity as to the party who omits to verify. *Andrews v. Storms*, 5 Sandf. 609.

The statutory form of affidavit relieves the defendant from the necessity of distinguishing in the answer, what he states on knowledge, and what on belief, and imposes on him the necessity of making his allegations positive in all cases. *Truscott v. Dole*, 7 How. 221; *Hackett v. Richards*, 11 L. O. 315.

Where the verification in the complaint is manifestly defective, it relieves the defendant from the necessity of verifying his answer at all. *Waggoner v. Brown*, 8 How. 212; see likewise *Lane v. Morse*, 6 How. 394. This course of proceeding, though admissible in a clear case, is somewhat hazardous in those in which any doubt exists. See this subject heretofore considered, and cases in point cited, in the chapter last alluded to.

In the same chapter, the provision to the effect that a party may decline to verify his answer at all, in those cases where such verification might subject him to a criminal proceeding, will be also found fully considered, and the cases cited.

The questions as to the mode of service, the effect of an amendment of an answer, and the other formal proceedings connected therewith, have also been previously considered. It will be remembered that, by service of an answer, all objections to the complaint for structural defects are positively waived. *Goch v. Marsh*, 8 How. 439.

Answer, and demurrer proper, are two separate pleadings, and, though they may be made out on one paper, and in connected form, they do not lose their distinctive character. Where, therefore, the defendant had thus framed his defence, and afterwards amended his pleading, by striking out a general demurrer subjoined to his answer, leaving the latter unimpaired, as far as regarded the issue of fact tendered by it; it was held that this was nothing more than service of a second copy of the original answer, and that a second reply was not requisite. *Howard v. The Michigan Southern Railroad Company*, 5 How. 206; 3 C. R. 213.

The provision of Rule 87, that, in all cases where more than one distinct defence is set up, they must not only be separately stated, but plainly numbered, must be borne in mind in the framing of answers, of whatever nature.

*Relief as between Co-Defendants.*—The answer must be directed to meet the plaintiff's case only; and all matter, solely relating to the adjustment of controversies between co-defendants, is immaterial, as regards the case of the plaintiff, and, if its effect be to delay or prejudice the latter, it will be stricken out on his application. Thus, where the answer stated no facts amounting to a defence as against the plaintiff, but was solely directed to the adjudication of equities as between co-defendants, the whole was stricken out, and judgment ordered for the plaintiff. *Woodworth v. Bellows*, 4 How. 24; 1 C. R. 129.

This rule is, however, inapplicable to proceedings in partition. Thus, in *Bogardus v. Parker*, 7 How. 305, it was held that the mutual claims of co-defendants may be tried and settled in a suit of this nature, provided they involve interests in, or liens on the property sought to be partitioned.

*Cases removed from Justice's Court.*—In an action removed from a justice's court, under the provisions of sections 56 to 61 of the Code, inclusive, on the ground of the title to real estate being in question, the answer in the court above must set up the same defence. Considerable discussion has arisen on this

subject, and as to whether the defendant is not bound, in these cases, to put in the same answer in form, as well as in substance; and also, whether it is competent for the plaintiff to reply to such answer. See chapter on the jurisdiction of justices' courts, and the cases of *McNamara v. Bitely*, 4 How. 44, and *Cusson v. Whalon*, 5 How. 302; 1 C. R. (N. S.) 27, there cited. In *Wendell v. Mitchell*, however, 5 How. 424, it was held that answers of this description were amendable, on points of form; and the more recent decisions of *Jewett v. Jewett*, 6 How. 185, and *Kiddle v. De Groot*, 1 C. R. (N. S.) 202, 272, established that both an answer, and a reply, may be put in in these cases, in the usual manner, and without any other restriction than that of setting up the same defence in the former, as that in the justices' court.

The latter view has since been confirmed, and the law on this point settled by the Court of Appeals, in *Wiggins v. Tullmadge*, 7 How. 404, which holds that the defendant is not required to use the identical words in his second answer, but only to make the same substantive defence, and, likewise, that he is at liberty to abandon part of that defence, if so advised, provided he does not alter the remainder by which he abides.

*Answer by Joint Debtors, &c.*—In cases where judgment has been taken against several joint defendants, on service of process against one only, under the provisions of chapter II. of title XII. of the Code, before and hereinafter referred to; and where the plaintiff subsequently takes out a summons against the defendants not served, to show cause why they should not be bound by such judgment, under the enabling provisions of the chapter in question: the defendants so summoned, may put in an answer in the usual form, and the matter, if defended, becomes in fact a regular action in all its parts, from the service of such summons, with this single exception, that the Statute of Limitations cannot be pleaded. See sec. 379.

In the analogous proceeding, given by sec. 376 of the same chapter, as against the heirs, devisees, or legatees of a judgment debtor, dying after judgment, or as against his personal representatives, or the tenants of real property owned by him and affected by such judgment, the power of defence is much more limited. Parties standing in this situation, are precluded from making any of the ordinary defences; the only lines open

to them being, either denial of the judgment itself, or subsequently arisen matter, in bar of the plaintiff's right to relief under it. If neither of these points can be raised, it will be useless to contest the claim, or to put in any answer at all.

### § 155. *Demurrer by Answer.*

The subject of demurrer to part of a pleading, and answer to the residue, has already been treated of, and the cases cited, in the last chapter.

The law on the subject of demurrer by answer is, in substance, the same as that contained in the last chapter. It would seem, from *Clark v. Van Deusen*, 3 C. R. 219, that, in order to sustain this line of defence, the complaint, or portion of the complaint, so objected to, must be admitted; and not traversed, so as to create an issue of fact, on the same point on which the demurrer is taken. This would, indeed, be to put in both demurrer and answer to the same cause of action, which, as shown in the last chapter, is not admissible. The only difference between demurrer proper and demurrer by answer, is in the form of the latter, by which, the facts necessary to show the existence of the objection so taken, must be averred in the usual mode, the grounds of demurrer arising on those facts being subjoined, in the usual forms of expression. In relation to the necessity of admitting the facts of the plaintiff's case, on raising an issue of law, see *Hall v. Bartlett*, 9 Barb. 297, before cited; see, too, the same general principle laid down, with reference to the incompatibility of a plea in abatement, or in bar, with an answer on the merits, in *Gardner v. Clark*, 6 How. 449.

The general nature and form of demurrer by answer is thus laid down in *Hornfager v. Hornfager*, 6 How. 279; 1 C. R. (N. S.) 112: "When it appears by the complaint, that there is another action pending between the same parties for the same cause, the remedy is by demurrer. When any of the matters enumerated in section 141, do not appear upon the face of the complaint, the objection may be taken by answer." A motion having been made in that case, to set aside the proceedings in an action for partition commenced by the defendant, on the ground that a similar action had been previously commenced by the plaintiff; it was held that "the remedy was to set forth, by answer in the suit last commenced, the pendency of the prior proceeding."

A similar view as to demurrer by answer being the proper mode of taking an objection for want of proper parties, is taken in *Ripple v. Gilborn*, 8 How. 456. An objection of this nature, on the ground of misjoinder, will be waived, by omitting to take it by way of demurrer, in the one or the other form. *Ingraham v. Baldwin*, 12 Barb. 9. See, likewise, as to nonjoinder, *Tripp v. Riley*, 15 Barb. 333. An objection, which goes to the ground of the complaint, will not, however, be waived by such an omission. *Ludington v. Taft*, 10 Barb. 447. See before, under the head of Demurrer.

The objection of jurisdiction, when taken by answer, must show, affirmatively, that the court had no jurisdiction when the suit was commenced, or it will be overruled on demurrer by the plaintiff. *Bridge v. Payson*, 1 Duer, 614.

In *The Union Mutual Insurance Company v. Osgood*, 1 Duer, 707, a demurrer, on the ground of want of a legal capacity to sue on the part of the plaintiff, was held to be frivolous, the objection not being apparent on the face of the complaint, and demurrer by answer was held to be the only admissible course under these circumstances.

The misnomer of defendants is an objection which cannot properly be taken by answer; motion will be the proper course. *Elliott v. Hart*, 7 How. 25.

In replevin, brought by alleged joint owners of property, an averment that such parties were not joint owners, as alleged, was held to be material, and to require a reply. *Walrod v. Bennett*, 6 Barb. 144. Of an analogous nature is the case of *Corning v. Haight*, 1 C. R. 72, where an answer, simply denying copartnership with the other defendants, was held to be a sufficient defence, to a complaint, for goods sold and delivered to all of such defendants "partners in business."

Where the complaint against the endorsers of a promissory note was framed according to the recent amendments, merely giving a copy of that instrument, and omitting any allegations of transfer, delivery, or ownership of the plaintiffs, a demurrer by answer, on the ground of the omission of those allegations, was refused to be stricken out as frivolous. *Lord v. Cheeseborough*, 4 Sandf. 696; 1 C. R. (N. S.) 322.

In *Humphreys v. Chamberlain*, 1 C. R. (N. S.) 387, it was held, that demurrer by answer was the only proper form of raising an objection, on the ground that the contract there sued upon

was void by the laws of the State in which it was made, and that such question could not be raised by demurrer proper, inasmuch as the courts of this State are not presumed to have judicial acquaintance with foreign statutes, but the contents of such statutes are matters of evidence, which must be alleged, and put in proof as such.

A form of demurrer by answer is given in the Appendix. It will, however, vary in various cases. When taken on the ground of a defect in parties, the names of the parties omitted to be joined must be given, in order that the plaintiff may be enabled to amend his complaint, if so advised.

The defendant must, however, be careful not to trust to his answer, for the purpose of raising demurrable objections, when those objections can be raised by demurrer proper. Where the averments of the complaint are, on the face of it, insufficient, the point cannot be raised by answer, simply taking the objection, and averring no facts in defence. *Hoxie v. Cushman*, 7 L. O. 149.

### § 156. *Traverse of Plaintiff's Case.*

*General Principles.*]—The next head above laid down, was the power possessed by the defendant, of putting the plaintiff to proof of his case, by traversing the facts averred in the complaint. This precaution must, in fact, be taken in all cases, whether new matter be set up in the answer or not. If neglected, every allegation omitted to be traversed will, under sec. 168, be taken as true, and cannot afterwards be controverted. See *Tracy v. Humphrey*, below cited; see, also, *Walrod v. Bennett*, 6 Barb. 144, which establishes this last doctrine; and also, that evidence cannot be given at the trial, for the purpose of contradicting an allegation thus admitted, or, rather, omitted to be denied on the pleadings. See, *per contra*, similar principles laid down, in reference to the omission of necessary allegations on the part of the plaintiff, in *Bristol v. Rensselaer and Saratoga Railroad Company*, 9 Barb. 158; and see the subject of the restriction of proof, *secundum allegata*, heretofore considered, under the heads of Complaint, and General Principles of Pleading.

By the amendment of 1851, a most important change was temporarily made, in relation to allegations traversing the plaintiff's case. Under the measures of 1848 and 1849, a ge-



neral or specific denial of the statements in the complaint was admissible; the Code of 1851 prescribed a specific denial in all cases, rendering it necessary to traverse every allegation *seriatim*, and *verbatim* also in most cases. It was accordingly held in *Rosenthal v. Brush*, 1 C. R. (N. S.) 228, and *Seward v. Miller*, 6 How. 312, that a general denial, however sweeping or emphatic, was bad; and that every material allegation in the complaint must be specifically, and in terms, denied by the answer. See, also, *Kettletas v. Maybee*, 1 C. R. (N. S.) 363. The inconveniences of this strict rule being manifest, it will be seen that, by the last amendment, the old phraseology is restored, and that a "general or specific denial" is again admissible in all cases.

In almost every case, except those in which the defendant really has no defence, and knows it, it will be found easy to frame a traverse of the plaintiff's case in general, by denying the allegations sought to be controverted, on "knowledge, information, or belief," or by denying any "knowledge or information" of those allegations "sufficient to form a belief," as provided by sec. 149. This phraseology gives the utmost license to the defendant in this respect, under any circumstances where such traverse is not grossly improper, and contrary to good faith. Even where responsive matter is pleaded, the defendant, as before remarked, should also traverse the plaintiff's case, unless his defence be consistent with a total or partial admission of it, as stated in the complaint. He should also be careful to do so in the very words of the complaint itself, as regards every material allegation. It is impossible to be too particular in complying with this last requisite. If strictly observed, no question can afterwards arise as to whether such allegations have, or have not been admitted, by non-denial in the answer; if not, any omission to deny, unobserved at the time, may possibly lead to serious results at the hearing. See *Walrod v. Bennett*, 6 Barb. 144, before cited.

*Benedict v. Seymour*, 6 How. 298, contains a long and subtle disquisition on the subject of defences, and the mode in which they should be framed under the Code; the necessity of stating every separate defence in a separate and distinct form being strongly insisted on, in analogy to the principles thereby laid down in reference to complaint also. See citation of the case under that head. The observations which there follow, are in reference to a strictly legal action, and are stated as not having

any bearing upon those which are equitable in their nature. In reference to the former, it was there considered that it is not competent for a defendant, first to traverse, and then to state matter in disproof of an allegation of the plaintiff; and that matter of the latter description ought, if so pleaded, to be stricken out. The views on this subject are most strictly laid down, and their result stated as follows: "Whenever an answer contains a traverse or denial of any one or more of the material allegations of the complaint, every thing else which it may contain, whatever it may be, is redundant, and must be stricken out on motion, unless it belongs to a separate and distinct defence." The views so stated appear to be mainly based upon the fact that, on a general traverse of the plaintiff's case, any matter in disproof is admissible in evidence; but, if carried beyond this, they seem open to doubt.

*What will be sufficient.*—In *Kellogg v. Church*, 4 How. 339, it was held that an answer, simply denying "each and every allegation alleged in the plaintiff's complaint," would do. This case, which was no longer of authority under the Code of 1851, has again become so, under the recent amendments. A specific denial to each specific allegation, will, however, be by far the most expedient form, in most, if not in all cases.

Where the allegation in the complaint was, "that the defendant "was indebted to the plaintiff," in a certain sum, on a settled account; an answer that the defendant "was not indebted as stated in the complaint," was sustained, inasmuch as the complaint stated indebtedness as a fact, and not as a conclusion of law. *Anon.*, 2 C. R. 67. As a general rule, however, the denial of a conclusion of law, without any allegation of facts, in opposition to those out of which the conclusion arises, will be wholly unavailable.

Allegations in the complaint which are wholly immaterial, need not be traversed at all. *Fry v. Bennett*, 5 Sandf. 54, 9 L. O. 330, 1 C. R. (N. S.) 238. See likewise *Isham v. Williamson*, 7 L. O. 340; *Newman v. Otto*, 4 Sandf. 668, 10 L. O. 14, and *Barton v. Sackett*, 3 How. 358, 1 C. R. 96, with reference to reply to an immaterial defence. It is only material allegations which, if not controverted, will be taken as true. A traverse of such allegations, however, if made, cannot be objected to as immaterial in itself, by the party whose original mispleader has

caused the defect; *King v. Utica Insurance Company*, 6 How. 485; and, where there is any, even the slightest doubt, as to whether the matter in question is material or not, it will be inexpedient to omit this precaution.

In *Davis v. Potter*, 4 How. 155, 2 C. R. 99, an answer that the defendant "verily believed, and therefore answered," that the plaintiff's demand was unfounded, was sustained as amounting to a "denial" of the facts. It is clear, however, and was so stated by the learned judge, that the same intent would have been more satisfactorily expressed, by a denial on knowledge, information, or belief, following the words of the section; and the case cannot, therefore, be safely drawn into a precedent, especially under the provisions of the Code as since amended. In *Fry v. Bennett*, above cited, an averment that certain facts were true, "as the defendant had been informed and believed," was sustained as an averment, on information and belief, of the existence of those facts, sufficient to raise an issue. See, however, the doctrine as laid down in *Truscott v. Dole*, 7 How. 221, and *Hackett v. Richards*, 11 L. O. 315, that allegations of this nature ought to be made positively in all cases, the reservation as to information and belief, being implied in the ordinary affidavit of verification.

In *Sawyer v. Warner*, 15 Barb. 282, an allegation, that the defendant never gave the plaintiff the note declared on, with a denial of indebtedness, was held sufficient to raise a complete issue as to its making and delivery.

In *Dickerson v. Kimball*, 1 C. R. 49, an answer, stating that the defendant "had not information" as to the facts of presentment, and non-payment of the promissory note, on which the action was brought, "sufficient to form a belief on the subject," was held to be enough to raise an issue, and a motion for leave to enter up judgment, notwithstanding such answer, was denied, without costs. See also, *Lord v. Cheeseborough*, 4 Sandf. 696, 1 C. R. (N. S.) 322.

Of a similar nature is the case of the *Genesee Mutual Insurance Company v. Moynihan*, 5 How. 321, where an answer, admitting some of the main facts alleged, but denying "knowledge sufficient to form a belief" of other allegations, which were also material, was held sufficient to put the plaintiff to proof of his case, and a motion for judgment was there denied with costs. The authority of this case is confirmed by *Snyder*

v. *White*, 6 How. 321, and *Temple v. Murray*, 6 How. 329. Thus, also, in *Smith v. Shufelt*, 3 C. R. 175, an allegation of the defendant, that "he was informed and believed that the plaintiff had received something on account of the demand in suit, and that the plaintiff was "not entitled to the whole of the sum claimed," would seem to have been held sufficient, and a motion to strike it out as frivolous denied; no facts or opinion of the court are however given.

In *Robinson v. Frost*, 14 Barb. 536, an answer which contained a general denial of each and every allegation of the complaint, was sustained as a sufficient traverse, not merely of the conversion of property there sued on, but also of the plaintiff's title, and that, under it, evidence of want of title on his part was admissible.

In *Dennison v. Dennison*, 9 How. 246, a very strict view is taken on the subject of denials, and it is held that, if the defendant commences his answer by a general denial, he will not afterwards be permitted to traverse specific allegations. He cannot answer in both modes; and the specific denials in that case were accordingly stricken out as redundant. This view seems inconsistent with the general principles of the Code, and with the permission to set forth, by answer, as many defences as the party may have. It is difficult, too, to conceive in what manner a plaintiff can be aggrieved, by the possibly superfluous, but at all events harmless, insertion of mere denials of allegations comprehended in a general traverse, but not involving any new matter.

In *Sherman v. Bushnell*, 7 How. 171, an answer, denying knowledge or information sufficient to form a belief that the payee of a note endorsed it to the plaintiff, was held sufficient to raise an issue, and sustained, on appeal from an order striking it out as sham.

Although, by omitting to make a specific denial of each of the plaintiff's allegations, the defendant will be held as admitting them; yet, if he traverse any one allegation, forming a component part of the right to recover, such traverse will be sufficient to raise an issue, and to prevent the plaintiff from taking judgment upon the case as admitted.

In *Lord v. Cheesborough*, 4 Sandf. 696, 1 C. R. (N. S.) 322, it was held competent for a defendant to raise an issue upon a fact essential to the plaintiff's recovery, though such fact be not averred in the complaint.

In traversing the plaintiff's case, it is not necessary to separate the different denials. The provision in s. 150, requiring several defences to be separately stated, applies only to affirmative defences. *Otis v. Ross*, 8 How. 193, 11 L. O. 343.

Where a fact controverted is presumptively within the defendant's knowledge, he cannot, as a general rule, be permitted to controvert it by a qualified denial. If he does not know or remember the facts alleged, he must state the lapse of time, or other circumstances, which he supposes will warrant his making a denial in that form, in the answer itself, or in the affidavit of verification. *Richardson v. Wilton*, 4 Sandf. 708.

*What will be insufficient as a Traverse.*—The last decision naturally introduces this branch of the subject, the answer in that case having been stricken out as frivolous, by reason of the absence of the explanatory statements there alluded to.

The mere denial of a conclusion of law, arising out of the facts averred by the plaintiff, without any allegation of facts, in opposition to those stated in the complaint, is no answer at all, and will be stricken out as frivolous. The cases establishing this proposition, have already been cited in the chapter as to the essential requisites of pleading. It is obvious that, if such objection to the law of the case be really sustainable, demurrer will be the proper form to take it, and not answer, according to the principle laid down in *Hoxie v. Cushman*, before cited.

Although a denial may be made as above, on information and belief, or of knowledge sufficient to form either, a mere allegation of ignorance of the facts of the plaintiff's case, is not sufficient. The traverse of those facts must be in one of the forms as prescribed by the Code, and will not be admissible in any other. Thus, in *Wood v. Stanleys*, 3 C. R. 152, an allegation in an answer, that the defendant was "ignorant whether" the facts set forth by the plaintiffs were or were not true, and leaving them "to offer such proofs thereof as they might be advised," was held to be an insufficient denial; and the facts in question were accordingly decided to be admitted, and a verdict taken for the plaintiffs accordingly, which verdict was sustained, on appeal to the general term.

The court will prevent the right of a defendant to make a traverse of this description from being abused. Thus, in *Mott v. Burnett*, 1 C. R. (N. S.) 225, where the defendant, sued as the

joint maker of a promissory note, denied any knowledge as to whether such note was made by the defendants, or either of them, the court held the answer to be bad, the averment of want of knowledge being false upon its face. The court were also disposed to hold the defendants to the strict phraseology of the Code, in the form of the denial, and to reject an averment, containing substantially the same words, though in another arrangement.

In *Hance v. Remming*, 1 C. R. (N. S.) 204, the principle laid down in the last case was still more strongly asserted, and an answer, traversing on information and belief a fact within the means of knowledge of the party, had he only chosen to ask his own attorney, when preparing his answer, was stricken out as sham. The court held that to permit such an answer, under such circumstances, would be to sanction a palpable evasion. The same principle is decisively laid down in *Nichols v. Jones*, 6 How. 355.

In *Edwards v. Lent*, 8 How. 28, the above doctrine is fully confirmed, and it is also held that a denial of sufficient knowledge, &c., without reference to information, will also be insufficient. It is only when a defendant has neither knowledge nor information, that he will be permitted to controvert in that form. See *Richardson v. Wilton*, above noticed.

In *Truscott v. Dole*, 7 How. 221, and *Hackett v. Richards*, 11 L. O. 315, a very strict view is taken on the subject of denials in general, and it is held that a material allegation in the complaint must be controverted positively, and not on information and belief, and, if not so controverted, must be taken as true. A general or specific denial is now required, and the defendant must do so absolutely, unless he has neither knowledge nor information sufficient to form a belief. Whether this doctrine prevail to the full extent, or not, there can be no question but that this mode of averment will always be most expedient, where practicable.

In *Fleury v. Roget*, 5 Sandf. 646, a denial in an answer, that the plaintiff was lawful owner and holder of a promissory note sued on, was stricken out as frivolous, and an allegation of an agreement that such note should be renewed on request, shared the same fate.

The same case is also reported, 9 How. 215. And similar decisions were pronounced by the same tribunal in *Flammer v. King*, 8 How. 216, and *Fleury v. Brown*, 8 How. 217.

A mere denial that the plaintiff had any interest in the premises, without any specific statement of the facts on which the defendant relied to sustain such allegation, was also held to be bad in *Russell v. Clapp*, 7 Barb. 482; 4 How. 347; 3 C. R. 64: so, likewise, in *Anon.*, 3 How. 406, with respect to an answer in slander, merely stating "that what defendant said of the plaintiff was true," without any statement of facts in support of such allegations.

In *McMurray v. Gifford*, 5 How. 14, an answer, merely alleging that a note sued upon was obtained by fraud, without showing facts to prove the existence of that fraud, was held to be bad. See, also, *Bentley v. Jones*, 4 How. 202, subsequently cited under the head of Reply.

So, likewise, in *Dykens v. Woodward*, 7 How. 313, it was held that an admission of facts constituting a fraud, must prevail over a mere unexplained denial of fraudulent intention. And the same principles are laid down, and a similar conclusion come to, in *Churchill v. Bennett*, 8 How. 309; and, likewise, in *Robinson v. Stewart*, Court of Appeals, 18th April, 1854.

Where the facts alleged by the plaintiff were sufficient to prove ownership of a promissory note, a denial of that ownership by the defendant, without alleging title in a third person, was held to be frivolous. *Cutlin v. Gunter*, 1 Duer, 253, 11 L. O. 201.

In libel, where the publication is libellous on its face, it will be needless to put in any denial of malice, nor will the defendant be permitted to do so. The law implies malice in such cases, and no issue can be raised on the subject, unless where the publication would be privileged, if not in fact malicious. Allegations to that effect in the complaint are immaterial, and need not be controverted. Those only are material, in the sense of the Code, which the plaintiff must prove on the trial, in order to maintain his action. *Fry v. Bennett*, 5 Sandf. 54; 9 L. O. 336; 1 C. R. (N. S.) 238.

Where a bill of particulars has been delivered, the answer must not be to that bill, but to the complaint itself. An answer, avowedly answering the former, was held to be insufficient, though not frivolous, in *Scovell v. Howard*, 2 C. R. 33. The same doctrine is distinctly enounced in *Kneiss v. Seligman*, 8 Barb. 439; 5 How. 425. It is there laid down as "well settled," that the only effect of a bill of particulars is to limit the testimony on

the trial; and that a party cannot plead or answer to such a bill. The Code has not changed the law in this respect. See, also, *Yates v. Bigelow*, 9 How. 186.

Even before the amendment of 1851, in a case where the complaint was for three separate bills of goods, and the answer disputed only one out of the three bills, but was silent as to the two others, judgment was given at once, for the amount of the two bills which were undisputed, leaving the action to proceed as to the other. *Tracy v. Humphrey*, 5 How. 155; 3 C. R. 190. The doctrine of this case has been adopted, and the serious objection, that it involved two judgments upon one record, obviated by the amendment in sec. 244, which gives the plaintiff power to apply to the court under such circumstances, that the defendant may be ordered to satisfy the admitted portion of the claim.

If, therefore, the defendant wish to contest the plaintiff's claim *in toto*, he must be especially careful on this point, in framing his traverse of that claim.

Although a separate specific denial of any one material allegation on the part of the plaintiff, will avail to raise an issue, a conjunctive denial of separate allegations will, on the contrary, be insufficient for that purpose. See *Hopkins v. Everett*, 6 How. 159; 3 C. R. 150, where such an answer was held bad on demurrer. "The denial in this case," it is said by the court, "should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue." The same conclusion is come to in *Salinger v. Lusk*, 7 How. 430. And a denial in this form will not render the answer liable to the objection that the defences so made are not separately stated. The provisions of the Code on that subject relate only to new matter. *Olis v. Ross*, 8 How. 193; 11 L. O. 343.

A hypothetical denial of the plaintiff's case, will not either suffice. This is expressly held in *McMurray v. Gifford*, 5 How. 11; *Royce v. Brown*, 7 Barb. 89, 3 How. 391; *Porter v. McCredy*, 1 C. R. (N. S.) 88; *Lewis v. Kendall*, 6 How. 59; 1 C. R. (N. S.) 402; *Sayles v. Wooden*, 6 How. 84; 1 C. R. (N. S.) 409. In all these cases a pleading of this description was held to be bad.

In *Corwin v. Corwin*, 9 Barb. 219, it was held that where, in an action to recover the possession of land, the complaint charged, in substance, a lawful title in the plaintiff; this is a



material allegation, which the defendant is bound to deny specifically, if he designs to put the title in issue. It will not be enough for him to spread out certain portions of what may be evidence in the cause, and rely upon that as an answer. He may either controvert the plaintiff's allegations in express words, or may set out the existence of facts which, if true, would show that the plaintiff has no title. By taking the latter course, however, and omitting to put the title in issue by a distinct and specific denial, he takes upon himself the burden of stating facts, which, taken to be true, are sufficient of themselves to show that the plaintiff has no title. If he fail in doing this, his defence will be nugatory. A specific denial should therefore never be omitted, whatever the affirmative facts may be, which tend to establish a superior right in the defendant.

In *Plumb v. Whipples*, 7 How. 411, it was held that an answer, consisting of denials only, cannot be amended under s. 172, because there is no matter in it requiring a reply; and an inquest taken upon the original answer was there sustained, notwithstanding the service of an amended one, putting in an affirmative defence.

In *Conklin v. Vandervoort*, 7 How. 483, it is held that an unverified answer, consisting of denials only, may be stricken out as false. In *Livingston v. Finkle*, 8 How. 485, the contrary conclusion is come to, on the ground that a negative pleading cannot be held to be sham, because it merely takes issue on the plaintiff's allegations, or false, when it does not assert any thing. Where the answer is verified, it is clearly not obnoxious to a motion of this description. See hereafter, under the head of Sham Answers and Defences.

### § 157. *Defensive Allegations, in Bar or in Abatement.*

*Estoppel—Res Adjudicata.*—In *Russell v. Gray*, 11 Barb. 541, a judgment in favor of defendants, for the value of property in replevin, and the subsequent collection of that judgment, was held to transfer the title to the property itself, and estop them from denying the plaintiff's title, in a subsequent action of trespass brought by the latter. Nor can the return of the sheriff be impeached, in a collateral proceeding of that nature.

The sureties on a bail-bond are estopped from controverting

the liability of their principal to arrest, in an action founded on that instrument. *Gregory v. Levy*, 12 Barb. 610; 7 How. 37.

The doctrine of estoppel is not applicable to an infant, under any circumstances, and a plea to that effect was held admissible, even where such infant had obtained goods by a fraudulent representation, that he was of age at the time of obtaining them. *Brown v. McCune*, 5 Sandf. 224.

Nor will a widow be estopped, in an ejectment for dower, even though she had actually received one third of the rents of the property in question. In order to bar her claim under these circumstances, it must be proved that the rent assigned to her will endure for her life. *Ellicott v. Mosier*, 11 Barb. 574.

A party whose own acts prevent the performance of a condition precedent, cannot avail himself of such non-performance, as a defence in an action against him. *Young v. Hunter*, 2 Seld. 203.

In *Kingsley v. Vernon*, 4 Sandf. 361, erroneous information given by the holder of a bill to an endorser, whereby the latter was led to believe it had been paid, and was prevented from collecting it at the time, though honestly given, was held to operate as an estoppel on the holder, and to discharge the endorser from liability.

In *Gardner v. Oliver Lee's Bank*, 11 Barb. 558, where the holder of a bill had proved his debt against the acceptor's estate, under the latter's insolvency, and accepted a dividend thereon, it was held that, by such proceeding on his part, the acceptor was fully discharged, and that such discharge operated as an estoppel between him and the drawer, and gave the latter a good defence.

The acts or declarations of a party bind him by way of estoppel, only to the extent that they have been acted upon by the party setting up the estoppel. *Merrill v. Tyler*, Court of Appeals, 12th April, 1853.

In *Anderson v. Broad*, 12 L. O. 187, it was doubted whether declarations made by a sub-agent, might not have the effect of estopping the principal, where such sub-agent had merely followed instructions given to the primary agent, and the principal had adopted the transaction, by receipt of its proceeds.

The doctrine of "*Res Judicata*" has been already considered in the chapter on complaint, to which the reader is therefore referred. It may be convenient, however, to notice some of the cases in point under this head also.

A mere submission to arbitration, where the proceeding has failed without the fault of either party, will not avail in bar of a fresh action. *Haggart v. Morgan*, 1 Seld. 422; same case, 4 Sandf. 198. Nor will a dismissal of a complaint by a referee, for a default to appear. *Salter v. Malcolm*, 1 Duer, 596. A valid and complete award by arbitrators will however be conclusive. *Coleman v. Wule*, 2 Seld. 44.

An action cannot be brought to remove a guardian appointed by a surrogate, even though fraud be shown. The proper course is to apply to the surrogate for an order. *Dutton v. Dutton*, 8 How. 99.

A surrogate's decree in favor of a will of personal property, will be conclusive in a collateral proceeding, even though there be evidence of error in it. *Vanderpool v. Van Valkenburgh*, 2 Seld. 190. It will not, however, be conclusive as against creditors of the estate, who do not come in and prove before him; *Bank of Poughkeepsie v. Hasbrouck*, 2 Seld. 216; nor will a surrogate's decree be held a bar to executors, in an action against their co-executor for a debt due to the estate, not embraced in the prior accounting. *Wurts v. Jenkins*, 11 Barb. 546.

A letter, agreeing to become security and sign a guaranty for rent, is an entire contract, and no more than one action can be maintained upon it, even for rent accruing at different periods. A prior recovery under that contract, will form a bar to any subsequent suit founded on it. *Waterbury v. Graham*, 4 Sandf. 215.

A judgment against the trustees of a village, upon confirming an assessment, was held to be final and conclusive, and not to be impeachable, except for want of jurisdiction apparent on the record, or by some matter *dehors*, which can be shown without contradicting it. *Buell v. Trustees of Lockport*, 11 Barb. 602, affirmed by the Court of Appeals, 12th April, 1853.

The judgment of a court of competent jurisdiction, on the question involved in a suit, is conclusive in a second suit between the same parties, depending on the same question, though the subject-matter of the two actions be different; and parol proof will be admissible, to show what was really in controversy. Under circumstances of this description, the answer should, therefore, be framed accordingly. *Doty v. Brown*, 4 Comst. 71.

A decree, dismissing a complaint on the merits, on an actual

hearing, was likewise held to be conclusive in any subsequent litigation, between the same parties, or those claiming under them. *Burhaus v. Van Zandt*, Court of Appeals, 30th Dec. 1852. See general principles as to the doctrine of *res judicata*, as laid down to the same effect, in *White v. Coatsworth*, 2 Seld. 137, and *Bates v. Stanton*, 1 Duer, 79; and likewise, very fully and widely, in *Birckhead v. Brown*, 5 Sandf. 134.

The doctrine of *res adjudicata* applies to a judgment on the same facts, pronounced in another State. *Dobson v. Pearce*, 1 Duer, 144; 10 L. O. 170, where it was held that a properly authenticated record of such judgment, ought to be admitted, as conclusive evidence of the facts on which it was founded.

A judgment recovered by one assignee of part of an entire demand, will, however, be no bar to a suit instituted by another in respect to his proportion. *Cook v. Genesee Mutual Insurance Company*, 8 How. 514.

A judgment or decree concludes the parties, only as to the grounds covered by it, and the facts necessary to uphold it, and no further. It forms no bar to a subsequent suit, on facts not passed upon. *Jones v. Alston*, Court of Appeals, 7th October, 1853. See also *Burdick v. Post*, 12 Barb. 168.

*Tender.*—An allegation of a tender and payment into court made by the defendant, must be full and specific, and complete in all its parts, or it will be unavailable as a defence. *The People v. Bunker*, 8 How. 258; see however *Holmes v. Holmes*, 12 Barb. 137, affirmed by Court of Appeals, 18th April, 1854.

*Statute of Limitations, &c.*—The defence of the Statute of Limitations can only, as a general rule, be properly taken by answer. See Code, sec. 74. In *Genet v. Tullmudge*, 1 C. R. (N. S.) 346, it was, however, held that, where an objection of this nature is apparent on the face of the complaint, demurrer would lie. This conclusion, though not without plausibility, seems untenable, in view of the positive wording of that section. The subject of limitations, intrinsically considered, has been already treated of, and the cases in point cited, in chapter III. of Book II., especially devoted to that subject. The objection is one that, unless specifically pleaded, cannot be taken. *Sears v. Shaffer*, 2 Seld. 268.

In *Hickok v. Hickok*, 13 Barb. 632, it was held that a person

intrusted with a note for collection, and who had received the amount, but neglected to pay it over, did not stand in the relation of a trustee, so as to deprive him of the benefit of the statute.

In pleading a public statute, an express reference to it, by its title or otherwise, is not necessary. It is sufficient to set forth the facts which render its provisions applicable, leaving the court to determine whether they apply or not. *Goelet v. Cowdrey*, 1 Duer, 132. This doctrine is clearly applicable to the Statute of Limitations, as well as to the Statute of Frauds, the enactment there in question.

In an action, brought by the State to recover the possession of lands, it has been held that an answer, merely alleging non-receipt of rents on the part of the people, in the words of subdivision 2 of section 75 of the Code, was insufficient, and demurrable to as such; on the ground that, as against the people, no presumption will lie, and that the defendant, in such cases, must plead the facts of his title, and show by specific allegation a documentary title in himself, or a continuous adverse possession. *The People v. Van Rensselaer*, 8 Barb. 189.

The same doctrine is laid down in *The People v. Livingston*, 8 Barb. 253, though there, a grant from the Crown of Great Britain having been shown by the defendant, judgment was given in his favor. See these two cases fully cited in a previous chapter, under the head of Limitations of Actions relative to Real Estate. The doctrine of these two cases is, however, overruled by the recent decision of *The People v. Arnold*, 4 Comst. 508, where it was held that an answer to the above effect, following the precise words of the subdivision before referred to, was good, inasmuch as it pleaded the facts of the case, and not the evidence in support of those facts; though, of course, upon the actual trial, a positive adverse possession must be shown.

The plea of the Statute of Limitations is compatible, until a traverse of the plaintiff's case on other points, and cannot be stricken out for inconsistency under these circumstances. *Ostrom v. Bixby*, 9 How. 57.

*Plea of "Plene Administravit."*—In actions against an executor or administrator, allegations, analogous to the old plea of *plene administravit*, are inadmissible; and, if made, the answer

will be held bad upon demurrer, and judgment given for the plaintiff, for future assets, "*quando acciderint*." The plea of *plene administravit* was not even a good plea under the Revised Statutes. *Hyde v. Conrad*, 5 How. 112; 3 C. R. 162; *Belden v. Knowlton*, unreported decision of Superior Court. In the latter case, however, allegations of this nature were refused to be stricken out upon motion, though subsequently held bad upon demurrer.

*Other Matters.*]—The plea of justification in libel and slander, and the point which has been raised, as to how far the assertion of an equitable title in the defendant may be considered as a bar to the plaintiff's right to recover in ejectment, will be considered under the succeeding heads, with reference to those particular forms of action.

In pleading a bankrupt's discharge by a court of the United States, the facts on which jurisdiction depends must be averred. When averred, however, that jurisdiction will be presumed, until the contrary appears. *Morse v. Cloyes*, 11 Barb. 100.

### § 158. *Defensive Allegations Continued, Averment of Facts.*

*General Principles.*]—The next head to be considered, is the allegation of new matter, going, either partially or wholly, to defeat the plaintiff's claim.

The general principles in relation to averments of facts, as laid down in the introductory chapter as to the essential requisites of pleading, are, of course, specially applicable to the subject of answer. The facts alone of the defendant's case form, as there laid down, the proper subjects of allegation. The pleading of a bare conclusion of law, unsupported by statements of facts, on the one hand, and allegations of the evidence of facts, and not of the facts themselves, on the other, are equally inadmissible. Allegations of the former nature, standing alone, constitute no defence at all: and those of the latter description will, if objected to, be stricken out as redundant.

A full, summary, and long discussion of almost every defect which can exist, with reference to statements of fact in an answer, will be found in *Boyer v. Brown*, 3 How. 391. The an-

swer there objected to, was held to be at once argumentative, contradictory, absurd, double, inconsistent, uncertain, incongruous, and, in many particulars, unintelligible, and was set aside in consequence. This decision was affirmed upon appeal. See *Boyce v. Brown*, 7 Barb. 80.

In *Bridge v. Payson*, 5 Sandf. 210, the following general principles are laid down with reference to averments in answer. Each separate statement must be complete in itself, but, to mark it as a separate defence, no formal commencement or conclusion is required. The statement of facts constituting a defence, need not be accompanied with the reasons why it should operate as a bar; the intent to rely upon it is a necessary inference. Nor is the joinder of matter of defence and matter in abatement in the same answer a ground of objection. It may, and must properly, contain every defence, of whatever nature, on which the defendant means to rely. Where no affirmative claim is made on the part of the defendant, a demand of relief in the answer will be wholly unnecessary.

Although public statutes need no special reference to them, on pleading facts which bring the case within their operation, and although this rule holds good as to statutes of local, as well as to those of general application, and to ordinances expressly founded on such statutes, (see heretofore, under the head of Complaint,) this is not the case with reference to ordinary municipal ordinances. Such ordinances are not public acts, to the extent that they can be noticed, without being specially pleaded. *The People v. Mayor of New York*, 7 How. 81.

Where the complaint is deficient in the necessary allegations, any fact omitted by the plaintiff, but essential to his recovery, may be denied by the answer. *Lord v. Cheeseborough*, 4 Sandf. 696, 1 C. R. (N. S.) 322.

The principle that evidence can only be introduced "*secundum allegata*," holds equally good, in relation to a defence, as to a cause of action. See *Catlin v. Gunter*, 1 Duer, 253; 11 L. O. 201; *Catlin v. Hanser*, 1 Duer, 309; *Coan v. Osgood*, 15 Barbour, 583.

If the defence be imperfectly put in, the defendant will be bound by it, and cannot introduce evidence of facts not embraced by the record. Thus, in *Kettletas v. Maybee*, 1 C. R. (N. S.) 363, evidence that the defendant had parted with a lease, upon which he was sued as assignee, was held to be inad-

missible, under a mere denial of the execution of that lease, and of the assignment of it to him, to which his answer was confined. See analogous principles in *Bristol v. The Rensselaer and Saratoga Railroad Company*, 9 Barb. 158.

A portion of an answer, professing to be a defence to the whole of the complaint, but being, in fact, an answer to part only of the cause of action, was held to be bad in *Thumb v. Walrath*, 6 How. 196, 1 C. R. (N. S.) 316.

The necessity of making a separate statement of each separate ground of defence, and, under Rule 87, of numbering each separate statement, must be borne in mind in all cases.

An answer, drawn according to the old chancery forms, admitting the facts, but stating legal propositions in defence, cannot be sustained under the Code. An answer, now, must either deny the allegations of the complaint, or state new matter, by way of avoidance. *Gould v. Williams*, 9 How. 51.

*Averments in Particular Cases,—Bills and Notes,—Guaranty, &c.*—In *Castles v. Woodhouse*, 1 C. R. 72, an answer, admitting the making and delivery of a note, but alleging that the goods, for which it was given, were inferior in quality to those contracted for, was held to be insufficient; because it did not state what was the defect in those goods, and what the difference in value occasioned thereby.

In *Hicks v. Hinde*, 6 How. 1, 9 Barb. 528, it was held that it is competent for the drawer of a draft, as well as for the endorser of a promissory note, to restrict his liability, by qualifying words added to his signature. The drawer having there signed as "agent," and the principal being known, and a party to the transaction, the former was held not to be liable.

In *Kingsley v. Vernon*, 4 Sandf. 361, erroneous information, given by the holder of a note to the endorser, was held to discharge the latter from all liability, and to operate as an estoppel on the former.

In *Gardner v. Oliver Lee's Bank*, 11 Barb. 558, the acceptance of a dividend out of the acceptor's estate, on the part of the holder, was held to discharge the former altogether, and to give the drawer a good defence, by way of estoppel, as between him and the latter.

The non-completion of a mutual contract, was held to be no defence to an action on a promissory note, given as part of its



terms, though the other party failed in a full performance on his part. *Pratt v. Gulick*, 13 Barb. 297. Where, however, an action of this description had been brought by the vendor of land, who had wholly failed to make a title, on a note given on account of purchase-money, before that failure, it was held not to be maintainable. *Burwell v. Jackson*, Court of Appeals, 18th April, 1854. The non-performance of a condition precedent, may, too, be a defence under these circumstances, unless such non-performance be occasioned by the act of the party himself. So held, with reference to a guaranty, in *Mains v. Haight*, 14 Barb. 76. The terms of a guaranty must be strictly complied with, or the guarantor will not be bound. It is a claim *strictissimi juris*. *Bigelow v. Benton*, 14 Barb. 123.

*Defence of Usury.*—Where usury is pleaded, it must be so in clear and distinct terms, and the terms of the usurious contract, and the quantum of usurious interest and premium, must be specified, and distinctly and correctly set out, and the facts distinctly alleged. A mere allegation that a note sued on was usurious in its inception, and that the payee knew it was executed fraudulently, and to sell usuriously, without further allegation of facts, was accordingly held to be bad in *Gould v. Homer*, 12 Barb. 601, 1 C. R. (N. S.) 356. See, to the same effect, *Fay v. Grimstead*, 10 Barb. 321. See, also, *Quick v. Grant*, 10 L. O. 344. In *Cutlin v. Gunter*, 1 Duer, 253; 11 L. O. 201, it was, in like manner, held that all facts tending to show usury must be specially averred, and the proof must correspond, in all respects, with the allegations, or the defence will be overruled.

Nor will the court allow an amendment after trial, to let in such a defence, against a holder of negotiable paper, for value, and without notice. *Same case*.

In *Bates v. Voorhies*, 7 How. 234, the court refused a similar application for leave to amend the answer.

In *Cuyler v. Sanford*, 13 Barb. 339, it was held that the exaction of a condition, that the money borrowed should be paid at another place, was not necessarily usurious, though the rate of exchange, at that time, was in favor of the latter; and a verdict obtained by the plaintiff was sustained.

In *Schermerhorn v. The American Life Insurance and Trust Company*, 14 Barb. 131, the defence of usury was sustained, in respect of a long and complicated series of transactions in con-

nection with a Land Company, and of securities given thereon, by which, in effect, a rate higher than the legal interest had been reserved.

In *Hurd v. Hunt*, 14 Barb. 573, a transaction in relation to the collection of a promissory note, and of an advance on account, by which the party who undertook that collection realized a trifling profit over the legal rate of interest, was held not to fall strictly within the character of a loan, and not to be usurious.

Where two parties had exchanged their notes to raise money by sale of them, it was held that each was a valid consideration for the other, and that a sale of either, at a discount greater than seven per cent, did not render it usurious in the hands of the purchaser. *Cobb v. Titus*, Court of Appeals, 18th April, 1854.

It will be obvious from the citation of the foregoing cases, that the defence of usury is one of great peril and uncertainty, and one that requires the strictest attention to the statement of details, in the pleading by which it is taken.

*Libel and Slander.*]—In libel and slander, sec. 165 of the Code specially provides for the combination of a plea of justification, with allegations of mitigating circumstances, as follows :

§ 165. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and, whether he prove the justification or not, he may give in evidence the mitigating circumstances.

The right to allege mitigating circumstances on the face of the pleadings is, however, confined to the above class of cases, and to them alone. Allegations of this nature have been decided to be inadmissible in actions for assault and battery. *Roe v. Rogers*, 8 How. 356; or breach of promise of marriage, *Smith v. White*, 7 How. 227; *Rosenthal v. Brush*, 1 C. R. (N. S.) 228. If admissible in evidence at all, they can be proved without being specially pleaded. See *infra*, in relation to similar allegations, when presented without the defence of justification.

In pleading a justification, facts must be stated. A bare allegation that "what the defendant said of the plaintiff was true," has been held to be insufficient. *Anon.*, 3 How. 406. The same is laid down in *Stygles v. Wooden*, 6 How. 84; 1 C. R. (N. S.) 409; and *Anibal v. Hunter*, 6 How. 255; 1 C. R. (N. S.) 403.

A long and interesting discussion on the subject of the proper allegations in this description of cases, will be found in *Fry v. Bennett*, 9 L. O. 330; 5 Sandf. 54; 1 C. R. (N. S.) 238, a case of demurrer to an answer of the most objectionable nature, and so characterized by the court. The following are amongst the numerous principles there laid down on the subject: The denial of malice, in a publication libellous on its face, is inadmissible; malice, in such cases, is a conclusion of law, on which no issue can be raised, and which the plaintiff cannot be required to prove, or the defendant permitted to deny; it is only where the publication is privileged, if not in fact malicious, that malice can be made the subject of an issue. No issue can be taken, either, as to the truth of inuendoes in the complaint. The sole office of an inuendo is explanation, and the only question which it raises is, whether such explanation is a legitimate deduction from the premises stated, which question it belongs to the court alone to determine. The principle that, in pleading justification, the facts tending to establish such justification must be distinctly and certainly averred, (see *Anon.*, 3 How. 406, below cited,) is clearly and positively laid down; and a general averment, that the facts stated in the publication complained of, "were and are true," was held to be insufficient. An answer is insufficient, in the sense of the Code, not only where it sets up a defence which is groundless in law, but where, in the mode of stating a defence otherwise valid, it violates those primary and essential rules of pleading which the Code has studiously retained. The question of privilege is laid down as one properly raisable by demurrer; and it is held that, in all cases where the defence of privilege is on the ground that the animadversions complained of were a fair and legitimate criticism, the defences of truth and privilege are inseparable; and, if the former is not duly pleaded, the latter must of necessity be rejected. The same principle is laid down as to the averment of mitigating circumstances, as that in *Graham v. Stone*, also below cited; and, justification not having been sufficiently pleaded, a demurrer to averments of that description was allowed. Where, too, circumstances of this nature are meant to be given in evidence, they must be stated as such in the answer; otherwise the plaintiff will have a right to infer that they are meant to be relied on in bar, and, on that ground, may justly demur to them. See observations on the same case,

under the heads of Demurrer, Irrelevancy, Complaint, and Demurrer to Answer.

The defence of justification is subject to the different incidents, and liable to the risks which attended it under the old practice. In *Fero v. Roscoe*, 4 Comst. 162, the law on this subject, in relation to pleadings under the present system, is clearly laid down. Where several charges are made, it is competent for the defendant to justify as to one only; but, on that point, his justification must be full. Failure in making out a justification, when pleaded, is still, as before, an aggravation; and, in that case, the defendant will be entitled to no benefit from the evidence adduced by him. Unless justification be pleaded, the defendant cannot prove the truth of the charge, either in defence, or mitigation; but, on a plea of the general issue, it is competent for him to introduce evidence to disprove malice on his part.

In *Bush v. Prosser*, 13 Barb. 221, in an action of slander, where the proof of the plea of justification altogether fell short of the offence charged, it was held that evidence of a minor offence was inadmissible, either in justification of the charge, or in mitigation of damages. See likewise *Lewis v. Kendall*, 6 How. 59, 1 C. R. (N. S.) 402. See also similar principles laid down in *Bisbey v. Shaw*, 15 Barb. 578. Nor will a mistaken impression of the law relieve the defendant from his responsibility in making an unsustainable charge.

In *Loveland v. Hosmer*, 8 How. 215, a partial justification, not going to the whole extent of the charge in the complaint, was held bad, upon demurrer to the answer.

Where, however, the libel complained of alleged the plaintiff to be a thief, and that she had stolen specific articles; allegations of various other thefts on her part, were held to be admissible in the answer, as tending to prove the general charge of theft. *Jayrocks v. Ayres*, 7 How. 215.

An answer of justification, in slander, must confess the speaking of the words complained of. *Anibal v. Hunter*, 6 How. 255; 1 C. R. (N. S.) 403. It must also, as before noticed, state the facts which go to constitute the crime imputed, so that a sufficient issue may be framed. If it merely state that the words spoken were true, it will be insufficient as a justification.

Although, by the above-cited section, allegations in mitiga-

tion of damages are expressly allowable, in cases where a justification is pleaded; in cases where the charge in the complaint is denied altogether, mitigating circumstances cannot be averred. This principle is expressly laid down by the court, and a demurrer on this ground allowed, in *Graham v. Stone*, 6 How. 15. The authority of this decision is confirmed by the following series of cases, laying down the law to the same effect: *Meyer v. Schultz*, 4 Sandf. 664; *Brown v. Orvis*, 6 How. 376; *Fry v. Bennett*, above cited; *Matthews v. Beach*, 5 Sandf. 256. In *Lane v. Gilbert*, 9 How. 150, it was held that, where a defendant cannot take issue on the material allegations in the complaint, either by denial or justification, he should not answer at all. He can give any mitigating circumstances in evidence, before the sheriff's jury, on the assessment of damages. In *Follett v. Jewitt*, 11 L. O. 193, the above conclusions are sought to be impeached, and the learned judge goes to the extent of laying down that matter in mitigation may be pleaded either with or *without a justification*; and similar views are enounced in *Stiles v. Comstock*, 9 How. 48. This view seems, however, to be contrary to the evident import of sec. 195, and the authority of these decisions to be wholly overruled by the series of cases to the contrary effect.

Allegations in mitigation, when standing alone and unsupported by a sufficient plea of justification, appear to be impeachable by way of demurrer. See various cases above cited. But, when accompanied with such a plea, they are not demurrable, nor do they require any reply, such matter not being in these cases a direct defence to the action, but merely matter for the consideration of the jury, in their assessment of damages, upon the trial. *Newman v. Otto*, 4 Sandf. 668; 10 L. O. 14.

Whether matter in mitigation is provable on the trial, in this class of cases, when not pleaded, has been made the subject of question. Evidence of that description was held to be inadmissible, under a mere general denial, in *Anon.*, 6 How. 160. In *Anon.*, 8 How. 434, the contrary conclusion is come to, on the ground that matter of that nature does not constitute a defence, and cannot therefore be pleaded; but that evidence in mitigation may be given on the trial, as under the former practice in these cases, and that subsisting in actions of an analogous nature. See *Schneider v. Schultz*, 4 Sandf. 664; *Smith v. Waite*, 7 How. 227; *Rosenthal v. Brush*, 1 C. R. (N. S.) 228. See, too,

*Lane v. Gilbert*, 9 How. 150. In *Stiles v. Comstock*, 9 How. 48, doubts were expressed on this head, but in connection with the views that matter of this nature can always be pleaded, which seem to be overruled, as above noticed.

The question as to what will or will not be considered as privileged communications, and, if so, to what extent, has been already considered, under the head of Complaint. See that chapter, and various cases, and the recent statute, c. 130 of Laws of 1854, there cited under this head. See likewise, in relation to privileged communications, *Taylor v. Church*, 10 L. O. 87, and various other cases there referred to, as to what will or will not be considered as constituting a cause of action in slander or libel, in a general point of view. See, in particular, *Bennett v. Williamson*, 4 Sandf. 60, as to libel, and *Phinck v. Vaughan*, 12 Barb. 215, in relation to slander.

In an action brought in respect of words spoken in a legal proceeding, and privileged on that ground, the defendant need not deny malice, in connection with the defence of privilege. *Garr v. Seblen*, 4 Comst. 91.

Similar views to those above cited in *Fry v. Bennett*, as to malice being implied by law, where apparent upon the facts, without any express averment, are likewise enounced in *Howard v. Sexton*, 4 Comst. 157. See, also, *Purdy v. Carpenter*, 6 How. 361.

In cases of the foregoing description, as in others, a hypothetical defence is not admissible, under any circumstances. See *Porter v. McCreedy*, 1 C. R. (N. S.) 88; *Lewis v. Kendull*, 6 How. 59; 1 C. R. (N. S.) 402. In the former case, the objectionable portion of the answer was stricken out; and, in the latter, a demurrer was allowed. See, also, *Sayles v. Wooden*, 6 How. 84; 1 C. R. (N. S.) 409. See likewise *Buddington v. Davis*, 6 How. 401.

[*Assault and Battery, &c.*] - The defendant, in these cases, will not be permitted to plead matter in justification, in connection with a general denial. *Roe v. Rogers*, 8 How. 356; *Schneider v. Schultz*, 4 Sandf. 664. See, however, *Lansingh v. Parker*, 9 How. 288. See, also, as to the general principle that matter in avoidance is incompatible with a general denial, *Arthur v. Brooks*, 11 Barb. 533; *Smith v. Waite*, 7 How. 227.

This rule will not, however, debar the defendant in these cases, from giving evidence of mitigating circumstances, if he

has any, on the trial itself. *Schneider v. Schultz*, above cited; *Rosenthal v. Brush*, 1 C. R. (N. S.) 228. This view is, however, partially questioned, in relation to the mode of pleading, but not as to the admissibility of the evidence, in *Stiles v. Comstock*, 9 How. 48, before noticed. See likewise, as to an action for breach of promise of marriage, *Smith v. Waite*, 7 How. 227.

In relation to what will or will not be admissible evidence in mitigation, under these circumstances, see *Corning v. Corning*, 2 Seld. 97.

*Divorce.*—Provocation on the part of the wife may be alleged by the husband, in his answer to a complaint by the former, for a divorce on the ground of cruelty. He may also introduce allegations to show the real value of a dowry received with her, and also statements in support of any equities he may have on that ground, in opposition to her claim for alimony. *Devaismes v. Devaismes*, 3 C. R. 124.

*Replevin and Trover.*—In an action to recover possession of property, distrained for doing damage, an allegation of lawful possession of the real property on which the distress was made, and that the property distrained was "*damage feasant*," will be sufficient, without setting forth the title to such property. See Code, sec. 166.

In trover for the cutting and sale of timber, on lands in possession of the purchaser under an executory contract, a parol license, when fully acted upon before revocation, will constitute a good defence; nor will the fact that the contract itself requires the license to be in writing, be a bar to such defence, when a parol license has been given, and acted upon. *Pierrepoint v. Barnard*, 2 Seld. 279.

### *Real Estate Cases.*

*Trespas, &c.*—A defendant, who has put the plaintiff's title at issue by his answer, cannot relieve himself from his consequent liability to costs, whatever may be the amount of the recovery, by admitting that title on the trial. It will be too late for him to do so then, after he has compelled the plaintiff to make the necessary preparations. *Niles v. Lindsley*, 8 How. 131; 1 Duer, 610.

*Partition.*—In partition, whether by petition or suit, any thing

may be pleaded "which will abate the action, or bar the petitioner's right to a judgment." *Reed v. Child*, 4 How. 125; 2 C. R. 69. But facts merely introduced for the purpose of endeavoring to charge the adverse party with costs, as, for instance, allegations of an unreasonable refusal to make partition by deed, will be stricken out as irrelevant. *McGowan v. Morrow*, 3 C. R. 9.

In a proceeding of this nature, it is competent for one defendant to dispute the claims of another; and these claims may properly be tried and settled in the general suit, if they involve interests in, or liens on the property sought to be partitioned. *Bogardus v. Parker*, 7 How. 305.

*Ejectment.*]—It was doubted in *Hill v. McCarthy*, 3 C. R. 49, whether, in ejectment, an equitable title could be set up as a bar to the plaintiff's claim. See, also, *Otis v. Sill*, 8 Barb. 102; *Crary v. Goodman*, 9 Barb. 657. *Cochran v. Webb*, 4 Sandf. 653, contains a positive ruling to that effect, holding that an equitable defence, looking to affirmative relief, could only be maintained by means of a cross action. This doctrine had, however, been doubted, even under the former Code. See *Wooden v. Waffle*, 6 How. 145; 1 C. R. (N.S.) 392. The amendment in the present, puts the power to do so beyond all doubt.

In interposing a defence of this description, the defendant must, however, become an actor in respect of his claim. His answer must contain all the necessary allegations to support it affirmatively, and he must ask and obtain affirmative relief. *Dewey v. Hoag*, 15 Barb. 365.

An allegation of adverse possession must be specific, and must state all necessary facts in relation to the claim so made. *Clarke v. Hughes*, 13 Barb. 147. In relation to the doctrine of adverse possession in general, see *ante*, under the head of Limitations.

In reference to ejectment, brought against a tenant, the old rule, which allowed the landlord to defend, is applicable under the Code, "*mutatis mutandis*." He may do so, in conjunction with the tenant, if the latter appears; or alone, if he fail to do so. But, to entitle him so to come in, his interest or privity of estate must be shown. *Godfrey v. Townsend*, 8 How. 398.

In relation to ejectment for dower, brought against a tenant, and what will or will not constitute a defence in such cases, see



*Ellicott v. Mosier*, 11 Barb. 574, before cited. Nor can a claim for dower be made the subject of a set-off. See *Bogardus v. Parker*, 7 How. 303, also before noticed.

*Specific Performance.*—In relation to a suit of this nature, and as to the duty of disclosure on the part of persons dealing with each other, and the limits of that duty, see *Bench v. Sheldon*, 14 Barb. 66, though, in strictness, that case does not relate to real estate.

A parol contract for the sale of lands, is absolutely void by the Statute of Frauds, and cannot be enforced, though there may have been a full performance of it on the part of the vendor, and a partial one on that of the purchaser. The vendor's only remedy will be an action for the balance of the purchase-money. *Thomas v. Dickinson*, 14 Barb. 90.

*Foreclosure.*—The purchasing mortgaged property by the mortgagee, under an execution sale, will not constitute a merger; nor can such a defence be subsequently set up on a foreclosure, by persons who have bought the land, expressly subject to the mortgage sought to be foreclosed. *Reed v. Latson*, 15 Barb. 9.

A mortgagee, in New York, has a right to redeem the premises, on an assessment for city purposes, and to add the amount to his mortgage; and a tender, not comprising that amount, will be wholly insufficient as a defence, on a foreclosure by him. *Brevoort v. Randolph*, 7 How. 398.

In *Pattison v. Taylor*, 8 Barb. 250; 1 C. R. (N. S.) 174, (an action for foreclosure of an old mortgage,) various facts were pleaded by the defendant, tending to raise a presumption that such mortgage was satisfied. Those allegations were, however, held to be bad, and judgment given for the plaintiff in consequence, on the ground that the defendant ought to have simply pleaded payment of the mortgage, and introduced any facts tending to show such payment, as matters of evidence on the trial. This case seems, however, to be somewhat questionable, with regard at least to the extent to which the above principle was carried. See considerations on this subject in a previous chapter, as to the essential requisites of pleading.

### § 159. *Counter-Claim, and Set-off, &c.*

We now come to the fourth head above laid down—viz., the allegation by the defendant, of matter either wholly or partially extinguishing the plaintiff's demand, by way of set-off or counter-claim. The law on this subject has been shortly declared by the recent amendment, as before cited; the indispensable requisites to a valid counter-claim now being—1, that it must be an existing claim in favor of a defendant and against a plaintiff, between whom a several judgment might be rendered; 2, that it must be a cause of action arising out of the contract or transaction on which the complaint is founded, or connected with the subject of the action; or, 3, that, in actions arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action, may be so set up. Any claims, either legal or equitable, or both, to which the above definitions apply, are now pleadable in the nature of set-off, without regard to the form of the action, whether legal or equitable.

The previous statute law on the subject of set-off, will be found at 2 R. S. 354; and the numerous decisions on that measure, which are cited in the books of the former practice, will, for the most part, be authority under the present, though many distinctions heretofore drawn, are now swept away, and the definition given as above is now much shortened and simplified in terms.

Under the Revised Statutes, set-off could only be pleaded as matter of defence; and a cross action was necessary, in order to enable the defendant to obtain affirmative relief, exceeding the amount of the plaintiff's demand. Under the Code, however, this restriction no longer exists, and affirmative relief is now obtainable by the defendant, to any extent, provided his right to such relief be established. See in particular the recent amendment in sec. 274. The conclusions to the contrary in *Wooden v. Wajle*, 6 How. 145, 1 C. R. (N. S.) 392, and the restrictions there sought to be imposed on pleading in these cases, are therefore no longer authority. The same is the case with reference to the doctrine laid down in *Cochran v. Webb*, 4 Sandf. 653, that an equitable defence, looking to affirmative relief, cannot be established, otherwise than in a cross action;

and likewise in *Haire v. Baker*, 1 Seld. 357, in relation to the necessity of a cross action, to enable a defendant, in an action for breach of covenant, to show mistake in the covenant itself. See the subject of the demand of affirmative relief in an answer, as treated in a subsequent section of this chapter.

It may be convenient to consider the cases in point on this subject, under the separate heads of set-off or counter-claim, generally considered, and counter-claim as provided for by the Code.

*Set-off or Counter-claim generally considered.*—The following decisions under the previous provisions, are generally applicable to the present:

A set-off, when pleaded, must be pleaded in definite terms, and the particulars thereof not only may, but must be alleged, with precisely the same particularity as is necessary to establish a cause of action in a complaint. The recent amendment in sec. 149, seems to put this beyond a doubt, even had it been doubtful before. An indefinite statement (such as was used in pleadings under the old system) will no longer suffice. *Wiggins v. Gaus*, 3 Sandf. 738; 1 C. R. (N. S.) 117. See *Ranney v. Smith*, 6 How. 420, in which the same general principles are laid down; though, under the Code as it then stood, it was held that several causes of set-off might be included in one statement of new matter, if properly distinguished. There can be no question that, as the provisions now stand, the safe and proper manner of alleging matter by way of counter-claim, will be to allege that matter, precisely as it would have been alleged, in drawing the complaint on a cross action. This principle is fully supported by *Dewey v. Hoag*, 15 Barb. 365, where it is held that, in an answer, setting up an equitable title in bar of an ejectment, the defendant must become an actor in respect of his claim; that such answer must contain all the elements of a bill for a specific performance; and that, by it, he must ask for and obtain affirmative relief. The answer in that case was held to be defective, because the defendant did not specifically offer to perform, nor ask that the plaintiff be required to perform, the contract there in question.

The set-off or recoupment claimed, being in the nature of an affirmative remedy, the defendant cannot both plead it, and also maintain a cross action for the same cause, at the same time. If

he do so, he will be put to his election between the two modes of proceeding, and will be forced to abandon either the one or the other. *Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1; *Fabbricotti v. Launitz*, 3 Sandf. 743; 1 C. R. (N. S.) 121.

In *Halsey v. Carter*, 1 Duer, 667, the defendant's right to make such election freely is maintained, and it is held that he is not bound, in his answer, to set up a demand, which, from its nature, is a proper subject for counter-claim. He may, as before, elect to enforce its recovery in a separate suit, and his rights in this respect have not been varied by the Code.

In *Deming v. Kemp*, 4 Sandf. 147, it was held, with reference to recoupment, that damages cannot be recouped, unless they arise in respect of the particular contract on which the action is founded. See *Bogardus v. Parker*, 7 How. 303, below cited.

Under the Code, a partial counter-claim is admissible, and matter, short of a defence, may be pleaded by way of recoupment, in mitigation of damages. *Willis v. Tuggard*, 6 How. 433; and not only so, but the defendant is bound to plead it in that form. *Houghton v. Townsend*, 8 How. 441.

The right to set off a demand against an assignee, has not been effected by the Code, but stands as it did under the old practice. When, therefore, the right of the assignee had become perfect, before the claim proposed to be set off had arisen, it was held that such set-off could not be maintained. *Beckwith v. The Union Bank*, 4 Sandf. 604; affirmed by the Court of Appeals, 31st December, 1853. See to the same effect, in relation to the doctrine that the right of set-off does not attach, till the debt in question actually becomes due, notwithstanding the intermediate insolvency of the debtor, *Keep v. Lord*, 11 L. O. 178; see also *Bradley v. Angel*, 3 Comst. 475.

To be pleadable at all, an equitable set-off must be such an equity as can be enforced by judicial action, not one arising from merely moral considerations. *Van Pelt v. Boyer*, 8 How. 319.

Nor can a fraud, practised by a person other than the plaintiff, be made the subject of an equitable set-off, though arising in respect of the same subject-matter, where there is nothing to connect the actual plaintiff with such fraud. *Reed v. Latson*, 15 Barb. 9.

In *Smith v. Briggs*, 9 Barb. 252, the court denied a motion

that a judgment, satisfied, and discharged of record, should be set off against another, (though it was claimed that such cancelled judgment was discharged merely for a particular purpose, and had not, in fact, been paid,) on the ground that they had no power to make such an order.

In *Merritt v. Seaman*, 2 Seld. 168, it was held that a debt, due from a testator, could not be set off, in an action brought by his executor, in his own name, on the promissory note of the defendant, though such note was given in respect of a debt due to the testator's estate. To be pleadable, a set-off must be between the same parties, and them alone. *Compton v. Green*, 9 How. 228.

Nor can a person indebted to a bankrupt, declared such under the act of Congress of 19th August, 1841, set off, against that indebtedness, a demand against the bankrupt, purchased after he presented his petition to be discharged. *Smith v. Brinckerhoff*, 2 Seld. 305.

A widow's claim for dower is not subject to a set-off for damages, nor for moneys due from her, in respect of the rents of the estate from which she claims dower. *Bogardus v. Parker*, 7 How. 303.

In an action in which a set-off is proper, any one or more of several defendants, jointly sued, may, severally, or individually, avail themselves of a set-off, so far as regards any one or more of them, apart from the others. *Pursons v. Nash*, 8 How. 454. See *The People v. Crane*, 8 How. 151.

Set-off is a remedy of a *quasi* equitable nature, and rests, as such, emphatically in the discretion of the court. This principle is fully laid down in *Baker v. Hoag*, 6 How. 201, where the court allowed one judgment to be set off against another, although the parties to those judgments were different: it appearing that equity would be promoted, and injustice prevented by that course.

It is clear, from the case of *Haire v. Baker*, 1 Seld. 357, that, in an action to recover damages for a breach of covenant, it would now be competent for the defendant to interpose a defence, that the covenant was not binding, in that particular instance, on the ground of mistake; though, in the then state of the law, a cross action for that purpose was held to be necessary.

The principle, that the same facts which would heretofore have entitled a defendant to be relieved in equity, may be now

set up in his answer as a full defence, is clearly laid down in *Dobson v. Pearce*, 1 Duer, 142; 10 L. O. 170.

In *Owens v. Ackerson*, 8 How. 199, it was laid down that, in proceedings under the Mechanics' Lien Law, a set-off may be pleaded, though arising out of other matters than those connected with the contract.

By the last amendment, any claim, arising out of the contract or transaction stated in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, can be pleaded as a set-off, or rather as a counter-claim, according to the new phraseology. The terms of this subdivision are large enough to comprise any cause of action whatever, within the above limits, and must therefore be considered as overruling, *pro tanto*, the previous provisions, that set-off was only admissible in actions arising out of contract, and in those where the demand was certain and liquidated.

In other respects, however, and except as regards different causes of action arising out of the same transaction, the principles last mentioned seem unshaken by the recent amendments. In actions sounding in tort, a set-off in contract cannot accordingly be pleaded, unless arising out of the same transaction. The decision, therefore, that, in an action of trespass, the defendant cannot seek to have, as a set-off, a money demand against the plaintiff, but that his only course is a cross-action, *Anon.*, 1 C. R. 40, seems to be still authority. It has been held that a judgment in a justices' court cannot be made the subject of a set-off, within five years of its rendition. *Smith v. Jones*, 2 C. R. 78; see sec. 71 of Code.

*Counter-claim, as such.*]—The cases above cited, under the head of Set-off, are all, of necessity, applicable to a defence of this nature, when interposed in the peculiar form, or rather under the peculiar title of counter-claim, as prescribed by the Code, as it now stands.

The term in question has been made the subject of much comment, in several of the cases below cited, and numerous attempts have been made to define its exact limits.

In *Roscoe v. Maison*, 7 How. 121, it was considered that a claim of an independent and hostile title to the property sued for, might be considered as a counter-claim, within the meaning of the amendment in question.

In *Silliman v. Eldy*, 8 How. 122, a counter-claim is defined to be "an opposition claim, or demand of something due; a demand of something which of right belongs to the defendant, in opposition to the right of the plaintiff."

In *Gage v. Angell*, 8 How. 335, it was held that the existence of an unliquidated and unsettled partnership account between the parties, and a claim of a balance due on that account, might be interposed as a counter-claim, in an action upon a promissory note for money lent.

In an anonymous case, 11 L. O. 350, it was held that, in a suit for a divorce, by the husband, it was competent for the wife to set up adultery on his part, and to ask for the necessary affirmative relief in that respect, in her answer, by way of counter-claim.

In *Dewey v. Hoag*, 15 Barb. 365, it was held that an answer in the nature of a bill for specific performance of a contract, was available as a defence in ejectment, if fully and properly pleaded.

The principle, that the same facts, which would formerly have entitled a defendant to be relieved in equity, may be set up in his answer, as a full defence, is clearly laid down in *Dobson v. Pearce*, 1 Duer, 142, 10 L. O. 170.

In *Hinman v. Judson*, 13 Barb. 629, it was held that the mortgagor of personal property, when sued for a conversion, may claim his right to redeem, as matter of defence, and, where he has not been foreclosed, may mitigate the recovery against himself, by reducing the judgment to the amount actually due on the mortgage.

In actions of a legal character, any defence, whether legal or equitable, may now be interposed. A suit in the nature of an injunction to restrain proceedings at law, will now therefore be not merely unnecessary, but unsustainable; *Hunt v. Farmers' Loan and Trust Company v. Rogers*, 8 How. 416. See likewise *Dederick v. Hoysrault*, 4 How. 350, before cited under the head of Injunction.

The question therefore seems to be settled, 1. that any claim on the part of the defendant in the nature of a set-off, available under the former law; 2. that any such claim, arising out of the contract or transaction sued upon by the plaintiff, or connected with the subject of the action; or, 3. that in actions on contract, any other cause of action on contract also, and existent at the

commencement of the action, are available as defences by way of counter-claim : or the proposition may be even more shortly stated, viz., that any defence which, under the old practice, might have been set up by way of set-off, or, with some slight modifications, any claim which, under the same practice, might have been set up by way of cross action, will now be so available. The requisition of affirmative relief, either in partial mitigation, or in total extinguishment of the plaintiff's claim, seems to be the governing test, by which the issue of counter-claim, or no counter-claim, must in all cases be tried.

The necessity and importance of such a test being strictly and rigorously applied, in considering the effect of an answer, as to whether it does, or does not require a reply, is evidenced by the long discussion that has taken place, and the numerous decisions that have been made on this particular point, and which will be found cited in the next chapter, under the head of Reply. Numerous as those cases are, and contradictory as some of them appear to be, the dominant principle is, after all, simple and clear. Matter alleged by way of defence, and not looking to affirmative relief, is not matter in counter-claim, and requires no reply. Matter in any wise looking to the assertion of such relief must be replied to, and, wherever there is any, even the slightest doubt as to the nature of such matter, and whether it may not possibly fall under the latter category, a reply will be the only safe course. See the whole subject, as further considered in the chapter in question.

In *Bogardus v. Parker*, 7 How. 303, above cited, it is held that a counter-claim, in an action not arising on contract, cannot be interposed, unless it arise out of, or be connected with the subject of the transaction on which the complaint is based. See the same case, as before cited. See likewise *Deming v. Kemp*, 4 Sandf. 147.

The defence by way of counter-claim looking to affirmative relief, an offer made by the defendant, after the service of his answer, for a balance admitted by that answer, will have the effect of extinguishing the counter-claim, if accepted, and, if refused, will deprive the plaintiff of his costs, should he subsequently recover less than the amount of the offer. *Schneider v. Jacobi*, 1 Duer, 694, 11 L. O. 220.

In making such an offer on the part of the defendant, if made before answer, he should make the discharge of his set-



off a specific portion of that offer, and apparent on its face. If he omit this precaution, the offer will be unavailing, and the plaintiff will be entitled to full costs, as though it had not been made, though the judgment he obtains be not more favorable in the actual amount. *Ruggles v. Fogg*, 7 How. 324.

### § 160. *Demand of Relief by Answer.*

In cases falling under the category of counter-claim, as defined in the last section, and where any thing in the nature of affirmative relief is sought by the answer, it seems clearly necessary, from the cases above cited, and particularly from those of *Haire v. Baker*, *Dewey v. Hoag*, *Gage v. Angell*, and *Anon.*, 11 L. O. 350, that such relief should be specifically and affirmatively demanded, in the same mode in which it would have been heretofore necessary to demand it, in a cross action. Nor is *Cochran v. Webb*, 4 Sandf. 653, an authority to the contrary, that case having been decided before the recent amendment, and proceeding on the principle that affirmative relief must be affirmatively sought. The same principle is also fully recognized in *Bridge v. Payson*, 5 Sandf. 210. See likewise *Dobson v. Pearce*, 1 Duer, 142, 10 L. O. 170.

Where, however, the answer simply consists of matter in defence, and affirmative relief is not sought, a prayer for general relief will be wholly unnecessary, and even irrelevant. See *Bridge v. Payson*, above cited. See, also, heretofore, under the head of Irrelevant Matter in Pleading.

### § 161. *Defects in Answer.*

*Insufficiency.*—The pendency of a prior suit for the same cause of action, in the courts of another State, or in the federal tribunals, is no defence to an action. The Code has not changed the rule in this respect. *Cook v. Litchfield*, 5 Sandf. 330; 10 L. O. 330. Affirmed by the Court of Appeals, 31st December, 1853.

The sureties in an undertaking on bail, cannot question the liability of their principal to arrest, in an action against them; and their answer to that effect, if put in, will be demurrable as insufficient. *Gregory v. Levy*, 12 Barb. 610; 7 How. 37.

The mere allegation that a note sued on was not *made* within six years before the commencement of the action, unaccompanied by any allegation as to its delivery, was held to raise an immaterial issue, and that the plaintiff was entitled to judgment, in *Mallory v. Lamphear*, 8 How. 491.

A party, whose acts prevent the performance of a condition precedent, cannot avail himself of such non-performance, as a defence in an action against him. *Young v. Hunter*, 2 Seld. 203.

A denial of the jurisdiction of the court, by answer, must show that the court had no jurisdiction when the suit was commenced, or it will be held bad upon demurrer. *Bridge v. Payson*, 1 Duer, 614.

A number of other cases, also bearing on this branch of objection, will be found in the different portions of the preceding chapter, and also in the closing chapters of this book, under the head of Proceedings before Reply, and Demurrer to Answer.

*Inconsistency.*—As a general rule, a defendant will be permitted to set up in his answer, as many defences as he may have, provided only those defences be plainly distinguished and separately stated. Thus, in *Bridge v. Payson*, 5 Sandf. 210, it was held that it is no objection to an answer that, after taking issue on the material allegations of the complaint, it alleges, as a defence, matters in abatement; and this conclusion seems clearly sustainable, notwithstanding the ruling to the contrary, in *Gardiner v. Clark*, 6 How. 449, which proceeds upon strict common law principles, without regard to the infusion of equitable rules as to pleading, which the Code has clearly introduced in all cases whatsoever. In *Ostrom v. Bixby*, 9 How. 57, it was held, that a plea of the Statute of Limitations was not inconsistent with a traverse of the plaintiff's claim in other matters.

Nor is the principle of inconsistency applicable to denials of the plaintiff's case, which it is competent for the defendant to make under any circumstances, to the full extent, and in connection with any new matter whatsoever, provided the same be not positively inconsistent with such denial. See *infra*, *Onis v. Ross*, 8 How. 193, 11 L. O. 343.

Where, however, new matter is alleged, the principle of inconsistency becomes applicable to averments in answers of that nature.

In an early case, it was indeed held, that the setting up of several defences inconsistent with each other, is admissible in an answer, provided only they are separately stated. *Anon.*, 1 C. R. 134. The complaint in that case was for assault, and the defendant had answered *non cul, son assault*, and accord and satisfaction; all of which defences the court admitted, and refused to compel the defendant to elect by which he would abide; and a similar rule is broadly asserted in *Stiles v. Comstock*, 9 How. 48, and likewise in *Lansing v. Parker*, 9 How. 288.

This principle seems, however, unsustainable, and has been directly impeached by the following decisions:

In *Schneider v. Schultz*, 4 Sandf. 664, it was held that, in a case of the same description, the defendant will not be permitted first to deny the charge, and then to set up *son assault demesne*. So also in *Roe v. Rogers*, 8 How. 356, an answer of the same description, which first denied the whole complaint, and then, as a further defence, set up matter in justification of an alleged assault and imprisonment, was stricken out as inconsistent. See also, the general principle, that the allegation of matter in avoidance is incompatible with a general denial of the complaint, as before laid down, and other cases cited, under the heads of Slander and Libel. See likewise *Arthur v. Brooks*, 14 Barb. 533.

The same principle as to inconsistent defences is fully carried out, and generally laid down, in *Arnold v. Dimon*, 4 Sandf. 680, where it was held, that a carrier by water will not be permitted to answer: 1. That he was not the owner of the vessel; and, 2. That the property shipped was delivered to the plaintiff.

In the recent cases of *Butler v. Wentworth*, however, 9 How. 282, the general term in the First District have decided, that a hypothetical justification, is consistent with a general denial in slander, *Clerke, J.*, dissenting.

The doctrine here laid down seems very doubtful, and inconsistent with a large majority of the decided cases, both as to the inconsistency of a denial and avoidance in the same pleading, and also as to hypothetical defences.

Hypothetical, alternative, or argumentative defences, seem also, notwithstanding the last decision, to be clearly bad, and will be held so. See this principle laid down, and numerous cases cited, in the prior parts of this chapter, and also

in a previous one, under the head of Essential Requisites of Pleading.

It seems indeed clear that, under the rule now enforced by the Code, that the facts of every case, and nothing else, are to be pleaded; allegations of facts, inconsistent with each other, and, therefore, in one aspect or the other, untrue, cannot properly be admissible under any circumstances. Where, however, this principle is not directly involved, it is equally clear that, under the Code, any number of separate defences may be set up, provided only they are separately stated, and, under the last amendment of the rules, plainly numbered. The decision in *Butler v. Wentworth*, above noticed, is based upon this right of the defendant, but apparently carried too far.

*Irrelevancy or Frivolity.*—In the last place, and with reference to answer in general, the making of either a sham, or an irrelevant, or a frivolous defence, must be carefully avoided. The powers of the court, and the rights of the plaintiff in the former of these respects, are greatly increased by the amendment of 1851, in sec. 152. It now stands as follows:

§ 152. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose.

Sec. 247 provides as follows in relation to frivolous defences:

§ 247. If a demurrer, answer, or reply, be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly.

Under section 152, as it stood in the Code of 1849, sham defences only could be stricken out on motion, and a restricted construction of the section prevailed in consequence; a construction, in fact, so restricted, that there is no reported case of relief being granted under it, except one, afterwards reversed by the general term. The decisions on the subject were as follows:

In *Davis v. Potter*, 4 How. 155, 2 C. R. 99, it was held that an answer, denying the plaintiff's allegations on *belief only*, could not be stricken out as a sham answer, and that the section now in question did not necessarily include the case of a *false* answer; for, if so, the truth of an answer might be tested on

special motion. It is only, the learned judge said, "where an answer takes issue upon some immaterial averment of the complaint, or sets up new or irrelevant matter, that it can properly be called a sham defence." See, also, *Temple v. Murray*, 6 How. 329.

It did not necessarily follow, either, that, under the late measure, a clearly frivolous answer could be stricken out as false. It must have been shown to be put in in bad faith, and to be so impertinent or grossly frivolous, that the court could not but see that the object was to delay or perplex the plaintiff, instead of presenting a defence. Unless this could be clearly established, the only proper course, under that measure, was to move for judgment upon such answer, as frivolous, under sec. 247. *Darrow v. Miller*, 5 How. 247; 3 C. R. 241. See also *Brown v. Jenison*, below cited. Similar views are likewise held in *Rae v. The Washington Mutual Insurance Company*, 6 How. 21; 1 C. R. (N. S.) 185, a decision under the section last referred to.

In *Mier v. Cartledge*, 4 How. 115, the court, at special term, somewhat departed from the principle of not testing the truth of an answer on special motion, (though fully acknowledging that principle in the main, and citing the case of *Broome County Bank v. Lewis*, 18 Wendell, 565, in support of it.) It appeared to the judge, in that case, that, from the wording of the answer itself, a real issue was not intended. On that ground, affidavits were allowed to be read, and it was held that the defence in the answer was a sham defence, and a motion to strike it out as such was accordingly granted, with costs, though without prejudice to the defendant's thereafter applying to the court, for leave to put in a defence in good faith. The defendants appealed from that decision to the general term, reported 8 Barb. 75, 2 C. R. 125, and the judgment in question was reversed, on the ground that the answer, having been verified under the Code, and there having been some ground to believe that it had been put in in good faith, ought not to be stricken out on motion. In *Tracy v. Humphrey*, 5 How. 155, 3 C. R. 190, the authority of the last decision was confirmed, and it was distinctly held that a verified answer could not be stricken out, as false, on affidavits. The same conclusion is likewise come to in *Cutlin v. McGroarty*, 1 C. R. (N. S.) 291.

The above decisions amounted almost to a practical prohibition of motions under this section, as unamended. Now, how-

ever, the case is different, and relief on the ground of irrelevant, as well as sham defences, being obtainable under this provision for the future, applications under it may be expected to become more frequent.

The principle, however, that a verified answer cannot be stricken out as sham, is as fully maintained under the section, as it stands now, as it was before the amendment. That principle may now be considered as fully established, by the above, in connection with the following further decisions, viz. *Miln v. Vose*, 4 Sandf. 660; *Caswell v. Bushnell*, 14 Barb. 393, reported, also, as *Sherman v. Bushnell*, 7 How. 171. And, even when the answer is unverified, the court will be indisposed to strike it out as sham, on allegation of its falsity, provided the issue taken by it be complete, and sufficient to raise, what amounted, under the old system, to the general issue.

In *Mier v. Curtledge*, above cited, it was laid down, at special term, that an unverified answer consisting of denials only, might be stricken out as false, on its falsity being clearly shown by affidavit, and that, in this instance, the court would depart from its usual custom of not trying the main issue in the case on affidavits; and, in the reversal of that case by the general term, this principle was not impeached. The same view has since been taken, and an unverified answer stricken out as false on affidavits of its falsity, in *Conklin v. Vandervoort*, 7 How. 483. It is likewise maintained in *Nichols v. Jones*, 6 How. 355, in relation to cases where the plaintiff's affidavits are not contradicted by the defendant, but not otherwise. See also *Ostrom v. Bixby*, 9 How. 57.

In other cases, however, this has been doubted. In *White v. Bennett*, 7 How. 59, it was held that the plaintiff, by merely verifying his complaint, subsequent to the service of an unverified answer consisting of denials only, could not, on that verification, move to strike out the answer as false. Leave was, however, given to amend his complaint, so as to obtain a fresh and verified answer from the defendant. The same principle is supported by *Winne v. Sickles*, 9 How. 217.

In *Livingston v. Finkle*, 8 How. 485, it is distinctly laid down that an unverified answer, merely taking issue on the plaintiff's allegations, cannot be stricken out as sham or false. It is not sham, because it merely denies the plaintiff's case. It is not false, because it does not assert any thing. It is a mere nega-

tive pleading, and, as such, is allowable, and cannot be impeached on affidavit, or otherwise than on a regular trial of the issue then formed. It is in the power of the plaintiff to prevent such a defence, by verifying his complaint. This decision has the greater force, because it is made under the expressed conviction, that the answer there in question was really false in fact, though admissible as a pleading. See also *Winne v. Sickles*, 9 How. 217.

In *Caswell v. Bushnell*, and *Sherman v. Bushnell*, above referred to, it is also distinctly laid down that an answer, consisting of denials only, cannot be stricken out as sham or false, and that objections on the above ground are only applicable to statements of new matter. This principle appears to be clearly sustainable, and to be decisive of the question.

Although, as above noticed, the powers of the court are now greatly extended by the amendment of sec. 152, in relation to irrelevant defences, relief of this description can seldom be counted upon, except in extreme cases. Thus, an answer, imperfect in point of form, but the facts contained in which might have formed a valid defence, if properly stated, was refused to be stricken out. *Alfred v. Watkins*, 1 C. R. (N. S.) 343. Thus also, an answer similarly void under the Code of 1851, as containing a general, instead of a specific denial of the plaintiff's case, was likewise refused to be stricken out, in *Seward v. Miller*, 6 How. 312; and an answer, merely containing a denial of notice to the endorser, in an action on a promissory note, was similarly treated in *Garvey v. Fowler*, 4 Sandf. 665, 10 L. O. 16, it being further held, in that case, that, even when manifestly put in for delay, the answer must be false in fact, and known to be so to the defendant, in order to justify its being treated as "sham."

Where, however, a manifestly evasive answer is put in, denying knowledge or information sufficient to form a belief, of facts within the defendant's knowledge, or means of knowledge, such answer will be bad. *Mott v. Burnett*, 1 C. R. (N. S.) 225; *Hance v. Remming*, 1 C. R. (N. S.) 204, both before cited; and, in the latter case, an answer of this description was expressly stricken out as sham, under the power above cited.

Answers of a similar description have also been stricken out in *Fleury v. Roget*, 5 Sandf. 646, 9 How. 215; *Flammer v. Kline*, 9 How. 216, and *Fleury v. Brown*, 9 How. 217. See likewise *Ostrom v. Bixby*, 9 How. 57.

The same result was arrived at, on similar grounds, in *Nichols v. Jones*, 6 How. 355; that decision proceeding, however, in part on the view taken in that case, as to the power of the court to test the truth of an unverified denial, upon affidavits, the soundness of which has been questioned, and apparently overruled, as before stated. The following general principles, in relation to defects in pleading, are laid down in the course of the opinion pronounced: "Upon the whole, I think, the various provisions of the Code on this subject are consistent, and cover the whole ground precisely, neither more nor less. If an answer, otherwise good, is loaded with unnecessary and redundant matters, the plaintiff's counsel should move, under section 160, to have such matters expunged. If doubts are entertained as to the sufficiency in law of the answer, and the opinion of the court is desired, it must be obtained by demurrer. If, however, any defence is palpably insufficient, a motion for judgment, on the ground of frivolousness, is the proper course; and, if the matters of defence can be shown to be clearly *false*, a motion to strike out as *sham*, will reach the evil. These four modes cover all defects in an answer."

Similar views to the above are also laid down in *Harlow v. Hamilton*, 6 How. 475.

The following definition of sham and frivolous answers respectively, is given by the Superior Court, in the case of *Brown v. Jenison*, 3 Sandf. 732, 1 C. R. (N. S.) 156, and will be of use, in pointing out the objectionable particulars to be guarded against, as above. "A sham answer or defence, is one that is false in fact, and not pleaded in good faith. It may be perfectly good in form, and, to all appearance, a perfect defence. Section 152 provides for striking out such answers. A frivolous answer is one that shows no defence, conceding all that it alleges to be true. Each may be stricken out on motion, but it is under different provisions of the Code."

In *Hull v. Smith*, 1 Duer, 649, 8 How. 149, the above definition is fully approved by the general term of the same court, with the qualification that, when, the answer is frivolous, as a whole, and not in part only, a demurrer, or a motion for judgment under sec. 217, will be the proper course; and, in the latter case, the motion must not be that the answer be "*stricken out*." It must, on the contrary, remain on the record, with a view to the review of the decision on appeal, if taken. Where, however, there is the slightest question as to the frivolity of



the pleading, demurrer, not motion, as above, will be the only proper course. See also *Miln v. Vose*, 4 Sandf. 660.

In *Howard v. The Franklin Marine and Fire Insurance Company*, 9 How. 45, an answer, setting up a clearly untenable defence, on the defendant's own showing, was stricken out.

In *Lane v. Gilbert*, 9 How. 150, where an answer in slander contained no direct defence, but merely stated matter in mitigation, it was held that a motion for judgment on the ground of frivolity was the proper course.

The questions as to what will or will not be considered as a frivolous defence, have been before fully entered upon, and the different cases cited, in the preceding portions of the present chapter, and also in the preceding division of the work, under the subject of the essential requisites of pleading; and the considerations in relation to the proper form of the application in such cases, will hereafter be treated of, under the proper head:

*General Remarks.*]—It follows of course from the foregoing observations, that both immateriality and frivolity in defence, are defects against which the pleader must carefully guard. It seems scarcely possible to imagine a case, proper for defence at all, in which these objections cannot be fully obviated, by a careful attention to the phraseology employed, and by recourse to the most extensive powers of traversing the plaintiff's case on information and belief only, before alluded to in the earlier portion of the present chapter.

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## CHAPTER V.

### COURSE OF THE PLAINTIFF, ON RECEIPT OF THE DEFENDANT'S PLEADING.

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*General Examination of Answer.*]—The first thing to be looked to by the plaintiff, on receipt of the adverse pleading, is to see whether it be regular in point of form, and, in the case of answer, duly and properly verified. See previous chapter, as to formal requisites of pleading. The pleading, if defective

must be returned forthwith, as there pointed out; and any objections, on that or any other formal grounds, must be taken at once, or else the right to do so may be considered as waived.

### § 162. *Motion to satisfy admitted Part of Demand.*

The next point for consideration, where answer is put in, is as to whether that answer does or does not contain an admission, that part of the plaintiff's claim is just, or that the defendant has property in his hands belonging to another party, on which admission an application may be grounded, that he may be ordered to satisfy such admitted portion, or to hand over or deposit such property admitted to be in his hands, as provided by the recent amendment in sec. 244.

The provisions of that section, in relation to these remedies, and the mode of their enforcement, are analogous to those provided by the former practice, and run as follows:

When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Whenever, in the exercise of its authority, a court shall have ordered the deposit, or delivery, or conveyance, of money or other property, and the order is disobeyed, the court, besides punishing the disobedience, as for contempt, may make an order, requiring the sheriff to take the money or thing, and deposit, deliver, or convey it, in conformity with the direction of the court.

When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a provisional remedy.

The above provisions had been, to a certain extent, anticipated by the case of *Tracy v. Humphrey*, before noticed, where the court had already given judgment to a plaintiff, for portions of his demand not denied by the defendant; and the remedy then extended, in a somewhat questionable manner, as the law then stood, has now assumed a certain and available shape.

It is, however, only appropriate to clear and unquestionable

cases, and not to those in which there exists any doubt or contest. Thus, in *Dolan v. Petty*, 4 Sandf. 673, where the answer traversed the plaintiff's claim for work and labor, adding that the work done was not worth more than a certain sum, the court refused to order the payment of that amount, because the answer did not admit a specific sum to be due.

Where, too, the defendant, prior to answering, had made an offer to allow judgment for the amount admitted in the answer, which offer was refused, a motion of the above nature was denied, on the ground that the practice was still unsettled; under which circumstances, the court would leave the plaintiff to his usual and ascertained remedies. *Smith v. Olssen*, 4 Sandf. 611. And such seems still to be the case, to a great degree, no decisions appearing in the recent reports, which bear upon the subject.

Where, however, the plaintiff's right is clear, the remedy will be both proper and available. Thus, in *Roberts v. Law*, 4 Sandf. 642, where the defendant admitted partnership funds to be in his hands, which, on his statement, belonged to the representatives of his deceased partner, he was ordered to pay over such funds, though the affairs of the firm were still unsettled. The plaintiffs were required, however, to give security, to contribute towards payment of outstanding claims, if established, and also their share of future expenses; and the defendant was allowed to retain sufficient to cover claims against the deceased partner, contested in the suit itself.

In *Burhaus v. Casey*, 4 Sandf. 706, funds in the hands of the defendant, intrusted to his charge for payment to a third party, were ordered to be deposited in court, or paid to the third party in question, within ten days; and, in the same case, 4 Sandf. 707, the same defendant was held arrestable, in respect of his neglect to perform his required duties in that respect.

### § 163. *Motion on ground of Defects in Answer.*

The answer should next be carefully examined, with a view to ascertain whether it contain any allegations liable to be stricken out for redundancy, or irrelevancy, or which the plaintiff may require to be made more definite or certain by amendment, under the provisions of sec. 160.

This subject has also been fully entered upon, in the introduc-

tory chapter of this portion of the work. The proceeding for that purpose must, as there mentioned, be taken speedily, and before the time originally allowed for replying expires, or the right to take it will be gone. See *Corlies v. Delaplaine*, 2 Sandf. 680, 2 C. R. 117.

The above proceeding refers more peculiarly to the insertion of irrelevant matters in a relevant defence, and to the purgation of the record in this respect; but it is also possible that the whole of the answer, or the whole of any ground of defence taken therein, may be sham or irrelevant. In this case the remedy of the plaintiff is different. A motion under sec. 160 will not meet the case, but the application must be made under sec. 152, as commented upon at the close of the last chapter. If the whole answer be stricken out as irrelevant, the plaintiff's course appears to be to sign judgment thereupon, under sec. 246, as for want of an answer, on affidavit, that no answer has been received, except the one stricken out; nor can the defendant put in any further defence under such circumstances, unless on leave of the court specially obtained, inasmuch as, the answer being stricken out, his right to amend as of course is gone. *Aymar v. Chase*, 1 C. R. (N. S.) 141.

If, though not sham or irrelevant, the demurrer or answer be frivolous, the course then to be pursued will be to move for judgment, under the provisions for that purpose contained in sec. 247, as cited in the last chapter.

The form and mode of entry of judgment so obtained, will be hereafter considered, and the cases in relation thereto cited, under the head of Judgment by Default. A motion under that section is absolutely necessary, for obtaining relief under the above state of circumstances; for, however frivolous the pleading may be, it cannot be disregarded as a nullity. *Corning v. Haight*, 1 C. R. 72; *Hartness v. Bennett*, 3 How. 289, 1 C. R. 68; *Swift v. De Witt*, 3 How. 289; 6 L. O. 314; 1 C. R. 25; *Noble v. Trowbridge*, 1 C. R. 38; *Stokes v. Hagar*, 7 L. O. 16; 1 C. R. 84; *Strout v. Curran*, 7 How. 36; *Griffin v. Cohen*, 8 How. 451. Nor can the plaintiff so treat a demurrer, put in jointly with an answer to the same cause of action, though either the demurrer or the answer, if so put in, is clearly bad. His only course, under those circumstances, will be to move to strike out either the demurrer or the answer, or that the defendant may be compelled to elect by which defence he will abide. *Spellman v. Weider*, 5 How. 5; *Stocum v. Wheeler*, 4 How. 373.

Although, under Rule 40 of the Supreme Court, motions on the ground of partial irrelevancy can only be made within twenty days after service of the pleading objected to, and, if not made, such objections will be considered as waived; a motion to strike out an answer altogether, as irrelevant *in toto*, or as sham or frivolous, may be made at any time before trial. If it be false or frivolous, the time of the court or jury ought not to be taken up in hearing it. *Miln v. Vose*, 4 Sandf. 660. See likewise *Stokes v. Hagar*, 7 L. O. 16, 1 C. R. 84, above cited. It may be made, too, within the twenty days allowed for an amendment, though, if the pleading be subsequently amended, it will then be denied without costs. *Currie v. Baldwin*, 4 Sandf. 690.

A motion on the ground of irrelevancy will be admissible where statements of new matter, not constituting a counter-claim, and not amounting to a defence, are made in the answer, and such matter is partial, or relates to one only of several defences. When, on the contrary, such new matter applies to the whole case, a motion under sec. 247 will be proper. *Quin v. Chambers*, 1 Duer, 673, 11 L. O. 155; *Lane v. Gilbert*, 9 How. 150. Demurrer will not lie to new matter in an answer, not constituting a counter-claim. See this subject fully treated in the next chapter, and the cases there cited.

A joint answer of parties, severally as well as jointly interested, unless verified by all, will be no answer, as regards those who omit to verify, and will be stricken out as such. *Andrews v. Storms*, 5 Sandf. 609; *Alfred v. Watkins*, 1 C. R. (N. S.) 343. The answer of a married woman, in her own person, and not by her next friend, was also taken off the file as no answer, in *Henderson v. Euston*, 8 How. 201.

The questions as to what will or will not be considered a frivolous pleading, have been before considered. Motions of the above nature, whether under sec. 152 or sec. 247, are only applicable to extreme cases, and not to those, in which the frivolity or irrelevancy of the pleading objected to is in any wise doubtful.

A merely insufficient pleading must be demurred to, and cannot be stricken out as frivolous, though clearly bad for insufficiency. *Scovell v. Howell*, 2 C. R. 33; *Alfred v. Watkins*, 1 C. R. (N. S.) 343; *White v. Kidd*, 4 How. 68; *Miln v. Vose*, 4 Sandf. 660, and various other cases before cited. It is only

where the pleading is palpably groundless and untenable, and put in for the purposes of vexation and delay, that the court will exercise the high power of expunging it from the record. *Neefus v. Kloppeburgh*, 2 C. R. 76. See also *Smith v. Shufelt*, 3 C. R. 175; *Seward v. Miller*, 6 How. 312. Nor will an answer be so stricken out, if it deny any one material allegation in the complaint, however insufficient it may be in other respects. See *Davis v. Potter*, 4 How. 155, 2 C. R. 99; *Garvey v. Fowler*, 4 Sandf. 565; 10 L. O. 16, and numerous other cases, before cited under the head of Answer. And such a denial is admissible, of facts essential to the plaintiff's recovery, even though not formally alleged in the complaint. *Lord v. Cheeseborough*, 4 Sandf. 696, 1 C. R. (N. S.) 322. In order to ground such an application, and warrant a judgment under the above section, "the case should be entirely clear, palpable on the statement of the facts, and requiring no argument to make it more apparent." *Rae v. The Washington Mutual Insurance Company*, 6 How. 21, 1 C. R. (N. S.) 185. See also *Miln v. Vose*, above cited, and *Hull v. Smith*, 1 Duer, 649, 8 How. 149.

The application to strike out a pleading as frivolous, must be for "judgment," under the terms of section 247, as above cited. It cannot be granted, on a notice of motion that an "order" will be applied for. *Darrow v. Miller*, 5 How. 247, 3 C. R. 241; *Rue v. The Washington Mutual Insurance Company*, above cited. See also *Bentley v. Jones*, 4 How. 335, 3 C. R. 37; and *King v. Stafford*, 5 How. 30. The motion must be for judgment, and not that the answer be stricken out. It must, on the contrary, remain upon the record. *Hull v. Smith*, 1 Duer, 649, 8 How. 149. No affidavit is necessary for the purpose of that application, which is made upon the pleadings alone; though it would be prudent to be prepared with formal proof of service of those pleadings, in order to the bringing on of the motion, in case the opposite party should not appear. See *Darrow v. Miller*, above cited.

In *Woodworth v. Bellows*, 4 How. 24, 1 C. R. 129, cited in the last chapter, judgment was given for the plaintiff at once, upon an answer merely directed to the adjudication of equities between co-defendants, and not setting up any defence whatever, as against the plaintiff's right to relief.

The form of a notice of motion for judgment as above, will be found in the Appendix. Of course, the above observations,

and the cases above cited, are equally applicable to the case of a frivolous reply, and to the application for judgment thereon, as indeed expressly provided by the section in question.

Objections of the above nature cannot be split up into several motions. They must all be embodied in the original notice, or relief will not be granted on a subsequent application. Thus, in *Desmond v. Woolf*, 6 L. O. 389, 1 C. R. 49, a motion to take a demurrer off the file as frivolous, was denied, a previous motion to set it aside as irregular having been made and failed. All possible objections to a pleading should accordingly be well considered, before moving to set it aside on any one ground; and, if more than one appear, the demand for relief should be shaped accordingly, and with sufficient comprehensiveness.

#### § 164. *Amendment of Complaint, and other Proceedings before final Joinder of Issue.*

If none of the above objections exist to the defence set up, or if any of them be taken and fail, the plaintiff, before taking the decisive course of either demurring or replying to that defence, where admissible, or of allowing the issue to go to trial, as it stands, should carefully look over the complaint a second time, and consider whether any new matter alleged by the defendant, has so far altered the statement of circumstances under which issue will have to be joined, as to render it expedient for him to amend his complaint; or whether any other reasons exist, which may render such a course advisable, such as omissions on his part to put his case in the best possible light, facts subsequently come to his knowledge, or other considerations of an analogous nature. The present is the point at which a full consideration of this subject is peculiarly fitting, because, if he permit the twenty days allowed for reply, after the service of his adversary's pleading, to elapse without amending, it will be no longer competent for him to do so as of course thereafter, and a special application to the court for leave for that purpose will be necessary. See *Snyder v. White*, 6 How. 321, and other cases before cited. Of course the above period of twenty days is spoken of, with the necessary reservation as to the effect of service by mail, where admissible, in doubling that period. The effect of an amendment, in putting back the

case, as it were, to the period of the original service of the complaint, and reöpening it, both with reference to the nature of the answer which may be put in by the defendant, and the time which will be allowed to him for that purpose, will not be forgotten.

If the defendant make an offer to the plaintiff, after the service of his answer, it gives the latter an absolute right to the ten days allowed to him by the Code; and no proceedings can be taken against him, until the ten days expire, or notice of acceptance be served. *Walker v. Johnson*, 8 How. 240. See also *Pomroy v. Hulin*, 7 How. 161.

The right of a party to amend his pleading is, as a general rule, absolute, unless it be palpably apparent that the amendment is made for the purpose of delay. See this subject fully treated, and numerous cases cited in a previous chapter, treating of amendment of pleadings by the moving party.

*Other Proceedings, before Reply or final Joinder of Issue.*—In *Groshons v. Lyons*, 1 C. R. (N. S.) 348, it was held that, where an answer of another action pending has been put in by the defendant, it will be irregular for the plaintiff to reply to such answer; and that the proper practice will be for him to apply at once for a reference upon that particular point, the result of which will dispose of the preliminary question. See also *Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1.

If the plaintiff do not consider any amendment to be necessary, and is satisfied to let the cause go to issue, on the pleadings, as they are, the defendant's demurrer, when taken, will have to come on for argument as an issue of law, in due course, and in the first instance, and before the trial of issues of fact, if such issues be raised collaterally in other portions of the pleadings. The measures for this purpose will be hereafter considered.

A question is raised in the *Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1, as to whether the same course ought not to be pursued, where the defendant has demurred by answer; but the soundness of this view appears doubtful, inasmuch as, an issue of fact being necessary to be tried in this case, in order to make the objection itself apparent, there seems no reason why the whole of such issues should not be disposed of simultaneously. If the facts necessary to ground the de-



murrer be admitted by the reply, the question might probably then be held to become, *de facto*, an issue of law, and to be triable as much.

If the defence be by answer, the first point to be considered is, as to whether such answer may, or may not be demurred to for insufficiency, under the power given for that purpose, in sec. 153; the second, as to whether, under the provisions of that section, it does or does not require a reply: both which subjects, and the course to be adopted thereupon, will be considered in the next chapter.

### § 165. *Discontinuance.*

Before proceeding, however, to this branch of the subject, it may not be superfluous to remark that, if the defence set up be so complete as to leave the plaintiff no chance of success, it is competent, and would be highly advisable for him to discontinue his cause, at this point, and before issue is finally joined, in order to avoid the increase of expense which that step will entail. The amount of costs payable by him in such event, will appear hereafter, in the chapter devoted to the consideration of that subject; and the different cases, showing that he cannot discontinue, without payment of all which the defendant can then claim, will there be cited. No particular form is requisite for the notice of discontinuance, but it should of course be in writing, be duly and properly served, and be accompanied with a tender of the full amount of costs and disbursements then actually due, as above referred to. It is usual, and will be always advisable, to obtain at the same time a consent from the adverse party to dismiss the complaint without costs, and to obtain and enter the usual order thereon, in order that the records of the court may be duly discharged of the suit, and that no question may arise thereafter on the subject. The defendant indeed will usually, and ought, in all cases, to make a positive requirement to this effect, as that the suit should be duly discharged is even more his interest than that of the plaintiff. An order must in fact be entered, where the discontinuance is necessary for the purpose of sustaining a second suit. See next chapter, and cases there cited.

In *Corning v. Smith*, 2 Seld. 82, it was held incumbent upon the plaintiff in foreclosure, to dismiss his bill as against an

alleged prior encumbrancer, erroneously made a party by him, unless he believed, and was willing to take the responsibility of showing, that the interest of such encumbrancer arose in fact subsequent to his mortgage.

When an equity suit has been continued by bill of revivor and supplement, the plaintiff cannot subsequently discontinue, without payment of the costs of both suits from the beginning. *Fisher v. Hall*, 9 How. 259.

If a suit be improperly brought in the name of a married woman, a discontinuance may be compelled, if that fact appear, upon her separate examination, according to the old chancery practice. *Rusher v. Morris*, 9 How. 266.

A notice of discontinuance, unaccompanied by the payment of the defendant's costs, is an absolute nullity, and will be of no effect whatever. See hereafter under the head of Costs, and the cases there cited.

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## CHAPTER VI.

### OF REPLY OR DEMURRER TO ANSWER, AND OF THE DEFENDANT'S PROCEEDINGS THEREON, WHERE ADMISSIBLE.

#### § 166. *General Considerations.*

THE provision of the Code with respect to these, the responsive pleadings on the part of the plaintiff, to any new matters set up in the answer, is contained in section 153, and runs as follows:

§ 153. When the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint constituting a defence to such new matter in the answer; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof, and the plaintiff may demur to one or more of several counter-claims set up in the answer, and reply to the residue.

The alteration effected by the last amendment in this respect

is important, as, under the previous Codes, including that of 1851, the statement of any new matter whatever in the answer, constituting a defence, involved the necessity of a reply on the part of the plaintiff, in order to the due joinder of issue in regard to such new matter. Under the present section, such reply is only necessary, where the new matter so set up constitutes a counter-claim. In relation to other matter set up in the answer, it is provided by sec. 168, as now amended, that "the allegation of new matter in the answer, not relating to a counter-claim, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require." The letter of this last section seems clearly to relieve the plaintiff from the necessity of a reply, in any case where no counter-claim is made, and to provide for the trial of an implied, instead of an expressed issue, upon any new matter, first raised by the answer; and, that such is the practice, seems now settled by a preponderating series of decisions below cited.

The question as to what will or will not be considered a counter-claim, has been already fully considered in the chapter on answer. In *Roscoe v. Maison*, 7 How. 121, the court held that, where a reply had been actually put in, and impeached for want of proper verification, the plaintiff, on the motion for that purpose, could not deny that he was bound to reply. In the same case, a disposition was shown, to consider every allegation hostile to the plaintiff's claim, as being in the nature of a counter-claim. In *Salinger v. Lusk*, 6 How. 430, the same learned judge contended at great length, and with great elaboration, that a demurrer for insufficiency would lie to an answer consisting of denials only, (the form of denial used being clearly objectionable,) and that an answer of that nature might and ought properly to be so disposed of; and *Noxon v. Bentley*, 7 How. 316; and *Seward v. Miller*, 6 How. 312, seem to favor the same construction.

See also *Hopkins v. Everett*, 6 How. 159; 3 C. R. 150. *Wisner v. Todd*, 9 How. 143, lays down too the same doctrine, in relation to new matter not constituting a counter-claim. *Bogardus v. Parker*, 7 How. 303, is also referred to in the opinion in *Salinger v. Lusk*, but, when examined, that case seems to be clearly distinguishable from the latter, the allegations there demurred to, and which demurrer was allowed, being practically in the nature of a counter-claim.

The counter propositions, viz., that an answer, consisting of denials only, or which merely alleges matter in defence not constituting a counter-claim, according to the definitions before given, effects a complete joinder of issue, express as to the matters denied, and implied, as to those alleged by way of defence : that an answer of this nature can neither be demurred nor replied to ; and that, if interposed, such a demurrer or reply will be stricken out ; are distinctly laid down, and appear to be conclusively settled by the following series of decisions, viz. : *Thomas v. Harrop*, 7 How. 57 ; *Bogardus v. Parker*, 7 How. 303 ; *Loomis v. Dorshimer*, 8 How. 9 ; *Silliman v. Eddy*, 8 How. 122, (in which the doctrine laid down in *Roscoe v. Maison*, viz., that, on a question of verification, the plaintiff is precluded from denying that he was bound to reply, is expressly dissented from ;) *Putnam v. De Forest*, 8 How. 146 ; *Williams v. Upton*, 8 How. 205 ; *Simpson v. Loft*, 8 How. 234 ; *Roosa v. Saugerties and Woodstock Turnpike Road Company*, 8 How. 238 ; *Quin v. Chambers*, 1 Duer, 673 ; 11 L. O. 155.

The practice in this respect may therefore be fairly considered as settled. There are, however, many cases, in which the exact limits, as to what will or will not constitute a counter-claim, may still be looked upon as doubtful. The governing test under these circumstances, would seem to be that, as to whether affirmative relief is or is not claimable by the defendant. Where such is the case, directly or indirectly, or even when there is any doubt on the subject, the omission to reply will be unadvisable, if not unsafe. Where, on the contrary, the allegations of the defendant are clearly and exclusively defensive, and their tendency is merely to abate the plaintiff's title to relief, and no further, the putting in a reply will clearly be as inexpedient as it would be unnecessary.

Whether the operation of the amended section as it now stands, is, in all cases, beneficial, admits of more doubt. It amounts, in fact, to a complete departure from the system so positively insisted on in other portions of the Code, viz. : that every question should now be tried on an express, and not an implied, issue ; and it presents the additional inconsistency of abolishing the general issue at once, and enforcing it by actual statutory enactment, at another stage of the pleadings in the same action.

There are many cases, in which these peculiar provisions may work very unequally, and even be productive of actual hardship.

The Code provides, and most beneficially provides, that, where the plaintiff's allegations in his complaint are not controverted by the answer, he is relieved from the necessity of proving them on the trial; a rule, equitable in itself, and of the greatest convenience, with regard to the due and speedy administration of justice. There are, however, numerous instances, in which the defendant, though not making any thing strictly in the nature of a counter-claim, may yet by his answer set up an affirmative defence, which, if proved, will wholly extinguish the plaintiff's title as to relief; for instance, pleas of payment, accord and satisfaction, a release by deed, &c. &c. Under the Code, as it stood before the last amendment, both parties were put upon equal terms; under this state of circumstances, both plaintiff and defendant were equally bound to admit or deny the facts in the adverse pleading; and if, when the latter stated in his answer a complete affirmative defence, the former omitted to controvert that defence, the controversy was at an end *pro tanto*, and the defendant was then relieved from the necessity of proving facts that his adversary was unable to controvert. The amendment wholly abolishes this convenient and highly equitable rule, and places the two parties, under these circumstances, on an unequal and somewhat unfair footing, relieving the one from the burden of proving, and holding the other to strict proof of facts which his adversary is unable to controvert.

Another instance may be mentioned, in which, in practice the system has been found to work unequally. A suit was brought, in the case alluded to, for the price of goods sold and delivered. The vendors, in that case, had agreed to take the note of a third party in payment for those goods, being induced to do so by representations on the part of the purchaser, which turned out to be untrue, and which, as they contended, were fraudulently made.

It was heretofore, and still is, clearly competent for parties standing in this position, to waive the tort, and sue on the contract of the purchaser, reserving their right to introduce evidence of the fraud alleged to have been practised upon them, in avoidance of the defendant's plea of payment, if made.

It is clear that the measure of proof, in such a case, would be less strict than in one where the fraud itself, and not the contract out of which that fraud arose, was made the gravamen of the action; and that an equitable view of the whole transaction

might, under these circumstances, be fairly taken, both by the court and the jury, on evidence which, in strictness, would be insufficient to sustain a verdict in tort.

The case now in question stood in this position, and presented the peculiar and anomalous feature, that the main issue, upon which the whole case, in fact, turned, was not merely not expressed, but *could not be expressed*, upon the pleadings, under the Code, as it now stands, as interpreted by the decisions before cited; and the case, had it proceeded to trial, would have been, necessarily and unavoidably, tried on an issue, which nowhere appeared, and which could not appear, on the actual pleadings.

It is singular, too, that, on the last amendment, section 154, which clearly points to the pleadings being brought to a final and definite issue, by allegations admitted or denied on both sides, according to the Code, as it stood before the recent changes, has been left wholly unamended. In *Williams v. Upton*, 8 How. 205, and *Quin v. Chambers*, 1 Duer, 673, 11 L. O. 155, the courts have supplied that defect, by a construction of s. 154 in harmony with the last amendment. In the latter case, the rule is laid down as follows: "Section 154, to be sensible, must now be construed as speaking of new matter, to which the plaintiff has a right to reply or demur at his election. It must be construed and applied, as if the word counter-claim, instead of the word defence, was contained in it." In *Wisner v. Teed*, 9 How. 143, this section was considered by the court as controlling s. 153, and as authorizing a demurrer to new matter in an answer, of any description; but this case seems clearly overruled by those before considered.

In cases of gross insufficiency in the answer, a motion for judgment under s. 247, may possibly afford relief, under this state of circumstances.

### § 167. *Demurrer to Answer.*

The law on the subject of demurrer to answer is, in a general point of view, the same as that as of demurrer to complaint, the chapter on which head should accordingly be referred to. The scope of the former is, however, of a more restricted nature, inasmuch as it will only lie for insufficiency; the other five heads of objection, pointed out in section 144, as cited in that chapter, being inapplicable to this stage of the action.

Demurrer, at this stage, is subject to precisely the same general conditions as demurrer on the part of the defendant. The grounds must be distinctly stated, and the facts in relation to the answer, or particular ground of defence demurred to, must not be traversed, so as to create an issue of fact on the same allegation. Thus, in *Clark v. Van Deusen*, 3 C. R. 219, averments, first, that the plaintiff had no knowledge or information as to allegations contained in the answer; and, second, that such allegations contained no fact, constituting any defence; were held to be bad, as regarded the latter portion of the sentence, such portion being in effect a demurrer, without admitting the allegations demurred to, but, on the contrary, raising an issue of fact thereon, and thus falling within the general principles on that subject, as before laid down.

If a demurrer of this description be partial in its nature, intrinsically considered, its being entitled at the commencement as a demurrer to the whole answer, will not have the effect of extending its operation to portions of that answer not comprised within the objections actually taken, by way of admission of facts, or otherwise. *Matthews v. Beach*, Court of Appeals, 12th April, 1853; reversing 5 Sandf. 256.

The cases in which a demurrer to answer will now be wholly inapplicable, under the recent amendment of s. 153, have been cited, and the matter fully considered, in the last section. The question of what will or will not be considered an insufficient answer, has also been previously discussed, and authorities adduced, in the chapter on that pleading, under the head of Insufficiency, and likewise under the general head of Essential Requisites of Pleading.

The following cases were chiefly decided under the Code of 1849, and, therefore, do not affect the principle above laid down, that a demurrer to answer will no longer lie, except in respect of new matter constituting a counter-claim; or, where those decisions are more recent, the point appears not to have been raised, and the parties to have been content to have the judgment of the court with regard to the intrinsic merits of the objection taken, without regard to the formal mode of its taking:

Demurrer will not lie to part of an entire ground of defence. *Cobb v. Frazee*, 4 How. 413, 3 C. R. 43, before cited, under the head of Demurrer. See, likewise, *Watson v. Husson*, 1 Duer,

242. So, also, in *Smith v. Greenin*, 2 Sandf. 702, it is laid down that a plaintiff can demur to an answer, only for defects in respect of the new matter set up by way of avoidance. He cannot demur thereto in respect of irrelevant and redundant matter, or in respect of indefinite or uncertain allegations. His remedy, in those cases, is by motion under sec. 160: nor will a demurrer lie, in respect of an omission to deny allegations in a complaint, as prescribed by sec. 149. If not denied, the matter must, under sec. 168, be taken as true. Of course, in both these cases, a motion, under sec. 160, to strike out the matter objected to, would have been the defendant's proper remedy. See other decisions to a similar effect cited in the previous chapters.

A long and elaborate discussion on the subject of demurrer to answer, will be found in the recent case of *Fry v. Bennett*, 5 Sandf. 54, 9 L. O. 330, 1 C. R. (N. S.) 238, decided by the general term of the Superior Court, and by which the authority of *Smith v. Greenin*, above cited, is fully confirmed. In the course of the opinion of the court, delivered by *Duer, J.*, the following general principles are laid down: "If those parts of the answer which are covered by the demurrer, tender a plain issue on any material allegation in the complaint, or set up a valid defence, the demurrer must be overruled; while, on the other hand, it must be allowed, if the issues which are formed are wholly immaterial, or the defences set up are insufficient in law." "An answer is deemed insufficient in the sense of the Code, not only where it sets up a defence which is groundless in law, but when, in the mode of stating a defence, otherwise valid, it violates those primary and essential rules of pleading, which the Code has studiously retained. Allegations of mitigating circumstances were held to be demurrable in that particular case, such allegations forming part of an attempted justification, not sufficiently pleaded. If matter of this last description be pleaded, it ought distinctly to appear that it was introduced for that purpose only, and not relied on in bar to the action, otherwise demurrer will lie. It was also held that the omission to demur to portions of the answer, containing matter of this nature, but no defence to the action in general, formed no ground of objection to the demurrer as put in; and, likewise, that the question as to whether a publication is, or is not privileged, may properly be raised on demurrer.



In *Newman v. Otto*, 4 Sandf. 668, 10 L. O. 14, it was held, on similar grounds to those laid down in *Fry v. Bennett*, as above cited, that matter pleaded in mitigation only, is not a defence, either in whole or in part, and is therefore not a subject of demurrer, nor is the plaintiff bound to traverse such matter in his reply. See, likewise, to the same effect, *Matthews v. Beach*, 5 Sandf. 256. Nor is this ground affected by the reversal of that decision by the Court of Appeals, 12th April, 1853, which proceeds on others, wholly independent of it.

In *Hyde v. Conrad*, 5 How. 112, 3 C. R. 162, a general demurrer, that "the facts stated in the answer did not constitute a sufficient defence," was upheld, as a sufficient statement of the grounds of demurrer for insufficiency. The answer in that case, was simply the old plea of "*plene administravit*," which, as before stated under the head of Answer, was held in that case, and also in *Belden v. Knowlton*, unreported, to be no defence at all. The same doctrine is laid down in *Anibal v. Hunter*, 6 How. 255; 1 C. R. (N. S.) 403; and *Arthur v. Brooks*, 14 Barb. 533.

If, however, an objection exist to the answer, and be not stated amongst the grounds of demurrer, it cannot be raised on the argument; the plaintiff will, on the contrary, be confined to the objections specifically taken. *Kneiss v. Seligman*, 5 How. 425; 8 Barb. 439.

Before the recent amendment of sec. 153, it was held to be competent for the plaintiff to demur to a denial in the answer. *Hopkins v. Everett*, 6 How. 159; 3 C. R. 150. A conjunctive denial of three separate allegations was there held to be bad: "The denial should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue." See also to the same effect, *Salinger v. Lusk*, 7 How. 430; and *Wisner v. Teed*, 9 How. 143. Under the amended section, this course is now inadmissible, as above shown. A motion for judgment, under sec. 247, would seem, therefore, to be the proper course under a similar state of circumstances.

In *Lewis v. Kendall*, 6 How. 59; 1 C. R. (N. S.) 402, a demurrer to answer in slander was allowed, on the ground of such answer being hypothetical. See, likewise, *Sayles v. Wooden*, 6 How. 84; 1 C. R. (N. S.) 409; *Buddington v. Davis*, 6 How. 401; *Arthur v. Brooks*, 14 Barb. 533. In the same cases, argumentative statements, and, in the last of them, the setting up

matter in avoidance, without admitting that, but for such avoidance, the action could be sustained, were likewise held to be demurrable defects.

In *The People v. Van Rensselaer*, 8 Barb. 189, a demurrer to answer was allowed, on the ground that a simple allegation of adverse possession was bad, as against the people, in an action brought by them for recovery of real property; and that the facts of such adverse possession, or of an adverse title, must be specially pleaded. This case is, however, overruled by *The People v. Arnold*, 4 Comst. 508. See heretofore, under the heads of Answer, and Limitations.

In *Seward v. Miller*, 6 How. 312, it was held that an answer, containing a general, instead of a specific denial of the plaintiff's case, as required by the Code of 1851, was insufficient, and demurrable as such. The former practice is, however, restored by the last amendment, and a general denial is now admissible, as before noticed.

An answer, assuming to answer the whole complaint, but which only showed a defence to part, was held bad upon demurrer, in *Thumb v. Walrath*, 6 How. 196; 1 C. R. (N. S.) 316.

In *Wilson v. Robinson*, 6 How. 110, a demurrer was allowed to an answer in false imprisonment, it appearing that the arrest complained of had been made, without jurisdiction having been duly acquired by the officer who issued the warrant.

In *Gregory v. Levy*, 12 Barb. 610; 7 How. 37, it was held that the sureties on a bail-bond were estopped from denying the liability of their principal to arrest, and a demurrer to answer was allowed on that ground.

Where a material issue is tendered by the pleadings, as they stand, a demurrer cannot be allowed, however improbable the defence may appear, in relation to the proofs to be adduced on the trial. *Dimon v. Bridges*, 8 How. 16.

In *The People v. Banker*, 8 How. 258, a demurrer to an answer alleging a tender, was allowed; the allegations in relation to the amount and nature of such tender being defective.

On the argument of a demurrer to answer, it is competent for the defendant to go behind it, and attack the complaint as defective; but the grounds of his attack must be such, as would have entitled him to a judgment, had he elected to demur instead of answering. If they fall short of this, he cannot do so. *Fry v. Bennett*, above cited; *Schwab v. Furniss*, 4 Sandf. 704, 1

C. R. (N. S.) 342. See likewise *The People v. Clarke*, 10 Barb. 120, affirmed by Court of Appeals, 31st Dec., 1853; *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573; *Noxon v. Bentley*, 7 How. 316; *The People v. Banker*, 8 How. 258. It was held, however, in the last case, that, under these circumstances, the defendant must be held to have waived all objections to the complaint, except those for want of jurisdiction, or insufficiency, as provided in sec. 148.

After the allowance of a demurrer to an answer, the defendant has a right to amend, as of course, except only when such amendment is made for delay, in which case, the court will strike it out, or impose terms. *Cooper v. Jones*, 4 Sandf. 699.

### § 168. *Reply.*

In relation to the subject of reply, it must be borne in mind that, under the Codes, whether original or amended, this pleading has never been necessary, where the answer did not contain allegations of new matter. If such answer amount to nothing more than a mere denial or traverse of the plaintiff's case, a sufficient issue is joined on the pleadings as they stand. See observations at the commencement of the chapter, on the effect of the recent amendment, extending this same principle, to all defensive allegations whatsoever, where no counter-claim is set up, and numerous cases there cited.

The following decisions are, for the most part, more peculiarly referable to the law on this subject, as it stood before the amendment in question. The main principles laid down in them, are, however, usually of general application; embracing the mode of pleading under the present, as well as under the recently repealed system.

In *Isham v. Williamson*, 7 L. O. 340, after deciding that the plaintiff's right to take objections to irrelevant matter in the answer was gone by delay, the learned judge proceeded as follows: "The plaintiff, however, need not be embarrassed in his reply, by reason of any irrelevant matter in the answer. Statements which have nothing to do with the case, and are, therefore, immaterial, expressions of opinion merely, and insinuations tending to throw discredit on the motives of the plaintiff, if found in the answer, need not be replied to." "It is only a

material allegation, which, if not controverted by the answer or reply, is to be taken as true." Sec. 168. See, also, *Barton v. Sackett*, 3 How. 358, 1 C. R. 96, below cited. It is obvious that the proper course would, in the cases last cited, have been to move under sec. 160. See, likewise, this subject considered, and other cases cited heretofore, in relation to demurrer. Nor, if the defendant himself present immaterial matter in his answer, can he object to the plaintiff's reply thereto as immaterial, though it may be unnecessary. *King v. Utica Insurance Company*, 6 How. 485.

In *Van Gieson v. Van Gieson*, 12 Barb. 520, 1 C. R. (N. S.) 414, it was held that where, in an action on a promissory note, payment was alleged by the answer, the latter allegation was not one of new matter, requiring a reply, to prevent its truth from being considered as admitted.

It has also been held that an answer, merely denying the plaintiff's case, and containing no new matter, need not be replied to. The defendant, in this case, cannot move for judgment under sec. 154; his remedy is to notice the cause for trial. *Brown v. Spear*, 5 How. 146, 3 C. R. 192, 9 L. O. 97.

Where the defendant served an answer, and a demurrer annexed to it, and subsequently, after reply, served what was called an amended answer, but which was in fact another copy of the former answer, without the demurrer, it was held that the plaintiff was not bound to serve a second reply, and the defendant's motion for judgment was denied with costs. *Howard v. The Michigan Southern Railroad Company*, 5 How. 206, 3 C. R. 213.

The plaintiff, as respects reply, has the same power to traverse new matter, by denial of knowledge, &c., sufficient to form a belief, as the defendant has with regard to answer. Such a reply controverts specifically, and is sufficient to raise an issue. *Doremus v. Lewis*, 8 Barb. 124; *Gilchrist v. Stevenson*, 9 Barb. 9.

In *Beals v. Cameron*, 3 How. 414, where the defendant pleaded that another suit was pending for the same cause of action, and the plaintiff replied that that suit was discontinued, such reply was held to be good, it being true at the time when it was put in. In order, however, to such discontinuance being effectual, an order must be duly entered, and notice served upon the defendant. A reply merely alleging that the suit was discontinued by notice to that effect, will be insufficient. *Averill*

v. *Patterson*, Court of Appeals, 7th Oct., 1853. Nor, if omitted at the time, can the order for that purpose be properly entered "*nunc pro tunc*" after the trial, so as in effect to overrule the defence of the pendency of another suit, and which, by reason of such omission, was then valid. *Bedell v. Powell*, 13 Barb. 183.

The questions which have arisen as to real estate cases removed from a justices' court, have been already noticed, and the conflicting cases on the subject cited, under the heads of Answer, and of the jurisdiction of those tribunals. It is now settled, that the pleadings in these cases must follow the ordinary form, and that a reply, where requisite, is admissible, which at first was doubted.

An answer, merely denying joint ownership on the part of plaintiffs who sued as partners, was held in *Walrod v. Bennett*, 6 Barb. 144, to be material, and necessary to be replied to. Under the recent amendment, no reply would be necessary, a sufficient issue being already raised.

Where a lien claimed by the defendants, was denied by the reply, such denial was held to be sufficient to warrant the introduction of evidence of fraud in relation to such lien, though none was specifically alleged. *Wager v. Ide*, 14 Barb. 468.

Allegations in reply, setting up the incorporation of the defendants, in order to controvert a denial of that incorporation in the answer, need not be more specific than those in a complaint, in a suit brought by such corporation. They need not show any thing beyond the general fact of incorporation, every thing beyond being mere matter of evidence, and the subject of proof, and not of pleading. *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573.

In *Barton v. Sackett*, 3 How. 358, 1 C. R. 96, it was, under the original Code, held unnecessary to reply to allegations as to the legal construction and effect of written instruments, or as to the intent and meaning of parties in executing a written contract. The adverse party's right to treat uncontradicted averments as admitted, was there held to be confined to averments of fact, and not to extend to allegations of the nature above referred to, though, of course, an averment of mistake or surprise in executing such agreement, would have been different.

The cause of action stated in the complaint cannot be altered by the reply, nor will the objection be waived, by the party's pro-

ceeding to trial without demurring. *Brown v. McCune*, 5 Sandford, 224.

In *Merritt v. Slocum*, 1 C. R. 68, 3 How. 309, the plaintiff was allowed to reply upon terms, after the cause had been actually heard before a referee, on an allegation that his attorney had omitted to do so through mistake.

If the plaintiff omit to reply to a set-off claimed by the defendant, he cannot take an inquest for the whole of his claim, without deducting the amount of that set-off. *Potter v. Smith*, 9 How. 262.

No particular form is necessary with respect to the reply to be put in. The allegations in it, as directed to the new matter necessary to be traversed or met by counter allegations, are, "*mutatis mutandis*," precisely similar to those in answer, and are subject to all the same incidents, as to form of averment or otherwise. Of course, the utmost attention will be paid to leave no material averment in relation to a counter-claim uncontradicted, especially as it seems very doubtful whether a reply can be amended at all, without special leave of the court. The provisions in sec. 172, do not seem to reach the case, inasmuch as, no answer being required or admissible, there can be no "period for answering," within which, as there prescribed, an amendment may be made as of course.

Rule 87, inserted on the recent revision, which provides that, in all cases of more than one distinct cause of reply, the same shall not only be separately stated, but plainly numbered, must be carefully observed for the future.

It would seem that, in certain cases, a reply may be unavoidable, without previous proceedings, in the nature of a reference, or otherwise. See *Groshons v. Lyons*, 1 C. R. (N. S.) 348. If such a case should occur in practice, of course an order, extending the time to reply until after the result of the proceeding, should be applied for; a notice to the adverse party may probably be necessary.

### § 169. *Defendant's Course on Service of Reply.*

*Motion to strike out, &c. Demurrer to Reply.*—On service of the reply, the defendant has two courses open to him for testing the sufficiency of that pleading.

The first of these courses, is the power to move to strike out irrelevant or redundant matter, which has been before treated of, and the cases cited, in the introductory chapter, and in those as to complaint and answer.

The second of these courses, is a demurrer to such reply as insufficient, as especially provided for by sec. 155. It will be seen, that this power is precisely analogous to the plaintiff's right to demur to the answer, as commented upon in the earlier portion of this chapter, and that the observations there made, or referred to, are equally applicable.

The following cases have especial reference to the subject of demurrer, as above:

A reply, not involving a traversable fact, but merely stating a conclusion of law, will be held bad upon demurrer. *Bentley v. Jones*, 4 How. 202; in which case the plaintiff merely denied "that the defendant had any interest in the premises," without showing how he became divested of an interest, alleged by his answer to be vested in him.

In *Rae v. The Washington Mutual Insurance Company*, 6 How. 21, 1 C. R. (N. S.) 185, a demurrer to reply for insufficiency, stating various grounds of objection, and pleading that the reply was insufficient on the ground of those defects, was refused to be stricken out as frivolous, though no opinion was given as to the ultimate result of such demurrer.

The motion there made, *i. e.*, that the demurrer should be stricken out, was held not to be for judgment on the demurrer, under sec. 247, and that, therefore, such motion could not be granted under that section, or on the short notice of five days thereby prescribed. See *Darrow v. Miller*, 5 How. 247, 3 C. R. 241, before cited.

In *Slocum v. Hooker*, 12 Barb. 563; 6 How. 167; 10 L. O. 49, an action brought against two adult joint contractors, and defended on the ground of a third not having been joined, a reply that such third joint contractor was an infant, was held to be good, and that the action was well brought; and, the defendant having demurred, judgment was given for the plaintiff upon the demurrer. This judgment was, however, subsequently reversed, and the reply held to be bad, in *Slocum v. Hooker*, 13 Barb. 536.

It might possibly be held that it is also competent for the defendant to move, under sec. 152, to strike out an objectionable

reply, as a "sham or irrelevant defence." See *Rae v. Washington Mutual Insurance Company*, above cited; though it may perhaps admit of a doubt, whether that section can be legitimately extended, so as to include other defences than those made by answer.

Another proceeding open to the defendant, if the circumstances admit, is to move for judgment on the reply as frivolous, under section 247. See previous observations as to this remedy, both generally, and in reference to a frivolous demurrer or answer.

*Motion for Judgment on Failure to Reply.*—An important remedy is also given to the defendant by sec. 154, which runs as follows:

§ 154. If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and, if the case require it, a writ of inquiry of damages may be issued.

Though, in terms, somewhat inconsistent with section 153, as it now stands amended, no doubt this section will be held to be controlled by that amendment, and that, where new matter in the answer goes to defence only, and does not constitute a counter-claim, a motion of this description will be inadmissible. See *Williams v. Upton*, 8 How. 205; *Quin v. Chambers*, 1 Duer, 673; 11 L. O. 155, before cited. See, however, per contra, *Wisner v. Teed*, 9 How. 143, also above noticed, but apparently overruled.

In *Brown v. Spear*, 5 How. 146, 3 C. R. 192, 9 L. O. 97, it was held, that the above section clearly relates only to an answer which relies on new matter constituting a defence, and not to an answer by which the plaintiff's case was merely traversed, no material additional matter being stated. It was held that all the papers needed on such a motion are the summons, complaint, answer, and notice of motion. Where, however, the plaintiff is not likely to appear, it would be advisable to be prepared with formal proof of the service of the pleadings, on which to ground the order by default. See *Darrow v. Miller*, 5 How. 247; 3 C. R. 241. For form of notice of motion, see Appendix.



It seems clear that, if any allegation in the answer constitute, if admitted, a complete defence, the defendant, on the plaintiff's failure to plead thereto, may proceed under the above section.

The test as to the admissibility of a motion of this description would seem to be, whether the defence set up in the answer is, in its nature, integral or collateral. In *Comstock v. Hallock*, 1 C. R. (N. S.) 200, it was held that "when an answer sets up as a distinct and substantive defence, a denial of the cause of action; and also, as may be done, sets up new matter in avoidance or bar, it will not be proper to give judgment for the defendant on motion, because of the want of a reply to such new matter, for the reason that there still remains an issue of fact, which is still to be disposed of, and which may yet terminate the suit in favor of the plaintiff. But, when the distinct cause of defence is substantially new matter, and, in pleading it, it becomes necessary to deny some of the allegations in the complaint, and there is no other denial in the pleading than such denial, forming, as it does, part of the defence of new matter; if the plaintiff omits all reply, the case comes within the 154th section of the Code, and judgment may be given for want of a reply." A motion for that purpose was accordingly granted in that case, the facts bringing it within the principle above laid down.

The observations above made have reference to the Code of 1851, and the previous measures. Under the recent amendments, a motion of this description would seem to be impracticable, except in the case of a counter-claim, exceeding the plaintiff's demand, and omitted to be replied to.

If the plaintiff omit to reply to a counter-claim in part, he cannot take an inquest for the whole of his claim, without allowing that counter-claim. *Potter v. Smith*, 9 How. 262.

A motion of the above description cannot be made at chambers. A judge has no power, out of court, to render a judgment on this ground. *Aymar v. Chase*, 12 Barb. 301, 1 C. R. (N. S.) 330.

An omission, at the time, to make a motion of this description, does not preclude the defendant from demanding such a judgment, on the actual trial of the cause. *Bridge v. Puyson*, 5 Sandford, 210.

*Amendment of Answer.*—If none of the above courses be taken by the defendant, and the reply disclose new facts, neces-

sary to be met by counter-allegations on his part, before issue can be properly joined on the pleadings as they stand, it is competent for him to amend his answer as of course, within the usual period after service of the reply. *Cusson v. Whalon*, 5 How. 302, 1 C. R. (N. S.) 27; *Seneca County Bank v. Garlinghouse*, 4 How. 174, and other cases before cited, under the head of Correction of Pleadings. Of course, if he take that step, he does so, subject to the contingency of the plaintiff's amending his complaint in consequence, and of the whole circle of pleading having to be gone through a second time.

From the time of the service of the reply, issue is to be considered as finally joined, subject, during the period allowed him for that purpose, to the defendant's right to amend. Notwithstanding the temporary existence of that right, the plaintiff is, nevertheless, at liberty to proceed with the cause, by serving notices of trial, &c., &c., immediately after the reply is served, and is bound to do so at once, if the defendant waives his right to amend, either by express notice, or by noticing the cause himself. *Cusson v. Whalon*, 5 How. 302, 1 C. R. (N. S.) 27, above cited. If, however, he take judgment within such period, and without such waiver on the part of the defendant as above, he does so at his peril, and under the risk of having such judgment set aside, if the defendant serve an amended pleading in time. *Washburn v. Herrick*, 4 How. 15, 2 C. R. 2; *Dickerson v. Beardsley*, 1 C. R. 37, 6 L. O. 389.

### § 170. *Final Joinder of Issue. Effect of on Pleadings. Admission of Facts not controverted.*

The above proceedings being exhausted, issue is now joined, and the effect of the completion of the pleadings, as regards specific allegations of fact, is laid down by section 168, as follows :

§ 168 Every material allegation of the complaint, not controverted by the answer, as prescribed in section one hundred and forty-nine; and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section one hundred and fifty-three, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.

The effect of the recent amendments in this section, in relation to averments in answer, assimilating the practice to that already existent as regards reply, in cases where no counter-claim is set up, has been already noticed.

It will be seen that, by this section, and also by the corresponding provisions in the previous measures, any new matter alleged in the reply, need not be specifically traversed by any subsequent pleading, and does not conclude the defendant in any manner. Unless, therefore, such new matter constitute a feature in the case, which necessitates an attempt to join issue in some other form than that presented by the existent pleadings, it will be scarcely worth while for the defendant to amend his answer as above, inasmuch as his power of bringing in any description of evidence, not entirely impertinent to the issue, as joined by the pleadings as they stand, is thus specially saved, without the necessity of any further measures on his part.

An omission to reply to a complete defence will be a fatal objection, and one that may be taken on the trial, notwithstanding the party may have neglected to make a previous motion on the subject, as allowed by s. 154. *Bridge v. Payson*, 5 Sandf. 210.

Such an omission, and the consequent admission of the fact not controverted, is conclusive, in every stage of the suit, and is sufficient ground for the court to disregard either the report of a referee, or the verdict of a jury to the contrary. A reply or answer may, however, be allowed, *nunc pro tunc*, if otherwise proper. *Willis v. Underhill*, 6 How. 396. If the plaintiff omit to reply to a partial counter-claim, he cannot take an inquest for his whole claim, without allowing that amount. *Potter v. Smith*, 9 How. 262.

Nothing, however, will be held to be admitted by an omission to controvert it, except what is well pleaded. See *Harlow v. Hamilton*, 6 How. 475; *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573; *Fry v. Bennett*; *Isham v. Williamson*, and numerous other cases, heretofore cited, in this and the preceding chapters.

Of course, co-defendants, possessing several interests, are not bound by each other's answers, or by any admissions contained therein. Still less is a defendant, who has not answered at all, bound by the pleading of one who has. See *Woodworth v. Bellows*, 4 How. 24, 1 C. R. 129.

## CHAPTER VII.

## REVIVOR AND SUPPLEMENTAL PLEADING.

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BEFORE passing on to the ulterior proceedings consequent on the joinder of issue, the subjects treated of in this chapter require notice, because, where admissible, the steps in question involve in all cases a formal, and in some, a material change of the issue to be tried, as joined by the original pleadings.

The subjects so requiring to be treated at this juncture are twofold, viz:

1. Revivor; and,
2. Supplemental Pleading.

§ 171. *Revivor, &c.*

The provision of the Code on this subject is contained in sec. 121, and runs as follows:

§ 121. No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued, by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made, to be substituted in the action.

It will of course be observed, that a premium is here given to diligence, and that, if the plaintiff move at once in the matter, his course is easier and simpler than that which he will be obliged to pursue, in case he delay his application for more than one year after the suit has abated. In the latter case, a supplemental complaint must be filed, and the whole course of proceeding will be precisely analogous to that on a bill of revivor

and supplement under the old chancery practice. The works on that subject may therefore be referred to, and the directions there given followed, both as to the form and mode of proceeding; and likewise as to obtaining the leave of the court in the first instance. See *Greene v. Bates*, 7 How. 296, confirming the view here taken.

Of course, the filing of a bill of revivor and supplement, involves, as of necessity, the service of fresh process, and implies a power to the defendant to put the fresh matter in issue, in the usual form.

It will be remarked that the provision, that actions shall not abate by death, marriage, disability, or transfer of interest, is only applicable to those cases where the cause of action survives or continues. The rule of "*actio personalis moritur cum personâ*," still holds good as to all others not falling under this description: such as actions for personal torts, and others of a like nature. It will be seen also, that transfer of interest does not, *per se*, create an abatement, but that the action may still be continued in the name of the original party, if thought expedient, notwithstanding such transfer. See *Sheldon v. Havens*, 7 How. 268. The contrary course was, however, pursued, and sustained by the Court of Appeals, in *Hastings v. McKinley*, 7th Oct., 1853. The case is otherwise as to death, marriage, or any other disability, by the occurrence of which, the person entitled to sue or to be sued becomes either non-existent, or personally incapacitated from continuing or defending the action, as originally brought.

Of course, in almost all cases, the parties entitled to revive, will avail themselves of the short and speedy method here pointed out, in the event of the application being made within one year from abatement. The provision in question prescribes that the application for this purpose shall be made upon motion; but, for obvious reasons, it seems expedient that such motion should be grounded upon a petition, duly verified. See Rules 38 and 39. The facts necessary to induce the court to grant an order of this description being substantive facts, going directly to the right of the substituted party to sue, it is most important that the statement of those facts should appear fully and directly upon, and should, in fact, form part of the record. No doubt they might be shown by affidavit, without petition; and there seems no positive obstacle to an order being

granted on an ordinary notice of motion, as was done in *Waldorph v. Bortle*, 4 How. 358; but still, for the reasons above cited, petition will be the more convenient form. See, too, *Williamson v. Moore*, 5 Sandf. 647, below cited, with reference to petition being, in some cases, the necessary form of application.

When the application is made by the representatives of a deceased plaintiff alone, they are the proper petitioners; but, if there be other co-plaintiffs, those co-plaintiffs should be joined. This appears clearly necessary, though no provision is made upon the subject; and, inasmuch as all the plaintiffs to an action must, of necessity, act in concert, and be represented by the same party, it can, for the most part, involve no practical inconvenience. Where the suit has abated by the death of a defendant, the former plaintiffs should be the petitioners. Where the application is by the transferee of an interest, he is of course the proper applicant. A clear *prima facie* right to continue must be shown, or the order cannot be granted. See *St. John v. West*, below cited.

The Code being entirely silent as to the course of proceeding in relation to an order of this description, the practice upon the subject can only be gathered by induction, or by analogy with the course pursued on a bill of revivor and supplement, under the old practice.

Where an order of this description is made for the mere continuation of the suit by a new plaintiff, the order is almost as of course, on a proper *prima facie* case being shown, but not, where the right to revive is in any manner doubtful. It would seem that, in clear cases, this application may be made *ex parte*, especially where the defendant has not appeared. See *Thayer v. Meul*, below cited. The better practice will, however, be to give notice to all the defendants, in all except the very simplest cases, either in the ordinary form, or by means of an order to show cause. A copy of the order for revivor, or continuation, when made, should be served on every defendant, and, where made on affidavit, copies of the affidavits should be served also. With this service the proceeding would seem to be complete. An issue as to the right of the substituted party to sue, being tendered by the order itself, and the proceedings on which it is grounded, no amendment of the complaint seems to be required. The substantive allegations of that pleading, and the relief demanded by it, remain as before, and the mere substitution of

one name for another, works no real change in the position of the defendants. If it do so, or if the right of the party to continue be doubtful, it will then be competent for the former, either to oppose the granting of the order in the first instance, or to move to vacate it afterwards, on affidavit showing it to have been improvidently granted. Where a supplemental complaint is necessary, of course a copy of it must be served in the usual manner.

Such would seem to be the proper course, where the order is to revive or continue, by the substitution of a fresh plaintiff: where the application is against the representatives or successors in interest of a deceased defendant, the points to be provided for are more in number. In this case, service of notice of the application, on the parties proposed to be substituted, is absolutely necessary, and, of course, such service must be personal, there being no attorney in the action, as regards those parties. The better mode of doing this would be by serving a copy of the petition, with a notice of motion subjoined, or, if the parties be merely formal, and if no substantive relief be demanded against them, an ordinary notice might suffice. It may be questionable, whether the remaining original defendants, if any, are not entitled to notice also; and the safer course will be to give it in all cases, and likewise to serve a copy of the order, when made, upon the parties in question.

The motion having been made in due course, a copy of the order thereon should be personally served upon each new defendant, and, with it, should be served a copy of the original summons and complaint, or a copy of the summons and notice of object of suit, in cases where no personal relief is demanded. Where, however, such party has formally appeared by attorney on the motion, and such attorney be willing to accept service in the usual manner, personal service may be dispensed with. If such new defendant have any personal interest in the matter, it would seem to be competent for him to put it in a fresh answer, if so advised. If so, the cause will then have to go through the ordinary forms, from that point, in relation to any new issue tendered by him; but where, on the contrary, such defendant is a mere representative, without any personal interest, and his testator or intestate has already answered, it will be neither necessary nor advisable for him to plead afresh. Of course, where any of the new defendants are infants, the usual forms as to

the appointment of a guardian *ad litem* must be complied with, before the plaintiff will be in a situation to proceed against them. See *Putnam v. Van Buren*, 7 How. 31, below cited.

Forms of petition for the above purposes, and of the order thereupon, will be found in the Appendix.

In cases of disability, by marriage, lunacy, or otherwise, supervening after issue joined, an application, under sec. 122, for the purpose of bringing in the additional parties rendered necessary, such as, for instance, the husband of a marrying party, or the committee of one becoming lunatic, &c., &c., will afford the proper remedy.

The following decisions have been made under the Code, in relation to the above subject:

In *O'Brien v. Hagan*, 1 Duer, 664, it was held that, when the plaintiff or defendant in a civil suit is sentenced to imprisonment in the State Prison, though only for a term of years, the suit is thereby abated, and a revivor will be necessary.

The provisions of sec. 121 were expressly rendered retrospective, by sec. 2 of the supplemental acts of 1848 and 1849, but, notwithstanding, the following difficulties have been suggested:

In *Phillips v. Drake*, 1 C. R. 63, the court appears to have considered, that an order could not be granted, to revive a suit commenced before the passage of the Code, unless the defendant consented to such course; and that the only proper remedy, in such case, was a bill of revivor and supplement, under the old practice. It may probably be held, however, that the subsequent amendment in section 459 has obviated this objection. In *Vrooman v. Jones*, 5 How. 369, 1 C. R. (N. S.) 80, it was held, that the above section, notwithstanding that it is in terms made retrospective by section 2 of the supplemental act, cannot be so considered, with reference to transfers of interest, which took place, previous to the passage of the Code. It would, if so, be unconstitutional, as tending to fix upon the transferees of such interest, the general costs of the suit, for which, under the old practice, they were not liable. This seems, on the contrary, to be a permanent objection, wherever the circumstances admit of its being taken.

In *Sheldon v. Havens*, 7 How. 268, where one of two plaintiffs had assigned to the other, and died subsequently, and an application was made, by the administrator of the latter, that the



suit should be continued in his own sole name, the court considered, that the interests of the defendant, with a view to the costs of the action, should be taken into account; and an order was made, that the original co-plaintiff should be continued, the administrator being also let in.

Where the right to revive is, *prima facie*, of course, it seems that no counter allegation will avail to deprive the party of it. Thus, in *Wing v. Ketcham*, 3 How. 385, 2 C. R. 7, it was held that the administrator of a deceased plaintiff might continue an action under a money contract, notwithstanding an affidavit by the defendant, that such deceased plaintiff had assigned his demand before the commencement of the suit; the court refused to try, upon affidavits, a point which involved the merits of the action. Leave was, however, given to the defendant, to amend his answer accordingly.

Although, where such an application is made by the administrator of a deceased plaintiff, in ordinary cases, it may probably be made *ex parte*, still, where there is any thing unusual in the application, notice ought to be given. Thus, in *Thayer v. Mead*, 2 C. R. 18, it was held that, where an administrator had been changed, it was irregular to revive the suit in the name of the new administrator, by an *ex parte* application, the defendant having appeared; but that such application could only be made upon notice. The order removing the administrator appears, in that case, to have been under appeal, at the time when the *ex parte* application was made by the substituted party.

Where a non-resident defendant dies, pending service by publication, and before the expiration of the period prescribed for that service, no action is pending, that can be revived against his representatives. *McEwen's Executor v. Public Administrator*, 3 C. R. 139. In *Moore v. Thayer*, 10 Barb. 258, 6 How. 47, 3 C. R. 176, the doctrine here laid down was so far confirmed. An attachment having, however, been granted in that case, during the lifetime of the deceased, it was held that the suit was thereby commenced, notwithstanding that the service of the summons remained incomplete; and the decision in *McEwen's Executor v. The Public Administrator*, was reversed on that ground.

In *Waldorff v. Bortle*, 4 How. 358, it was decided, that a motion, to continue an action of ejectment against the heirs of

a deceased defendant, was correct: the court throwing out a *dictum*, (though that question was not at issue,) that, if there were a third person in the occupation of the premises, he ought also to be made a defendant.

In *Putnam v. Van Buren*, 7 How. 31, it was considered, on the contrary, that the heirs of a deceased defendant are not his successors, or rather, as expressed in the opinion, his *survivors*, in interest; and that an order could not be made against infant heirs under those circumstances. This conclusion is, however, doubtfully expressed, and seems, when examined, more than doubtful. The order there made was, though, clearly sustainable, on other grounds. It did not appear by the petition in that case, that the heirs there in question were in possession, or that they asserted any hostile claims; nor had the petition been duly served on the proper parties, but only on the attorney for the ancestor, who had no authority to appear. It was, therefore, held, and, doubtless, correctly held, that the plaintiff should have shown, affirmatively, that he could not obtain possession without making the heirs parties, and that the latter should have had an opportunity to elect, whether they would continue or abandon the action. A guardian should have been first appointed, and then the papers for the motion should have been served on him.

On the death of one of several plaintiffs in ejectment, leaving a will, under which three points were doubtful,

1. Whether the trustee under that will would take the title to the lands, or only a power in trust;

2. Whether the devisee could or could not be regarded as a citizen capable of inheriting real estate; and,

3. Whether, under these circumstances, the title had not passed to the State by escheat;

A motion to add the names of the trustee, the devisee, and the people, as plaintiffs in the place of the testator, was denied, and that denial sustained upon appeal. It was held, that the party applying to continue a suit, must make out a clear *prima facie* case, showing himself to have succeeded to the title without question; and *Boydton v. Hoyt*, 1 Denio, 53, was cited to that effect. It was further held that, if a mere case of doubt were made out, the right secured by the statute did not attach, and that that statute gave no right of experimenting as to the proper party. It was, however, conceded, in the course of the

opinion, that, if the application had been for the court to determine, upon the facts presented, which of the three parties had succeeded, and to substitute such party, it might probably have been entertained. A doubt was also thrown out as to whether the people, claiming under escheat, could continue an action at all, as "successors" to a deceased party; and it was held, on the contrary, that theirs is a *prior* right, become paramount by the extinction of that upon which the action is founded, and therefore not coming within the terms of the statute. *St. John v. West*, 4 How. 329, 3 C. R. 85.

In *Hatfield v. Bloodgood*, 1 C. R. (N. S.) 212, it was held that the provision of the Code, authorizing a suit to be revived against the executor of a deceased party, applies as well to the defendant in a cross bill, as to the original suit.

In *Averill v. Patterson*, Court of Appeals, 7th Oct., 1853, it was considered, with reference to the necessity of a formal order of discontinuance, that a suit may be revived after any lapse of time, there being no Statute of Limitations upon the subject.

In *Hastings v. McKinley*, 8 How. 175, it was held, that the provisions of sec. 121 do not apply to cases pending in the Court of Appeals, and that the necessary relief, to enable the representatives of a deceased party to continue an appeal, may be granted on motion, according to the former practice of the court, without the necessity of any application to the court below, or of any supplemental complaint being filed. The question as to what is the effect of such an order on any ulterior proceedings in the cause, in the event of a new trial being granted, and the cause being remitted to the court below, does not appear to have arisen. It might well be argued that, in that state of circumstances, a supplemental complaint would become necessary, with reference to the second trial; and, in case of such a state of circumstances arising, an application to obtain the further relief, or settle the question, would appear unquestionably prudent, if not necessary, though, of course, after the decision in the court above, and not pending the appeal.

In *Ridgeway v. Bulkley*, 7 How. 269, it was held that the defendant, in case of the decease of the plaintiff, is entitled, as of right, to an order that it be continued in the name of his representative.

In *Miller v. Gunn*, 7 How. 159, the representatives of a de-

fendant, who died after judgment in the plaintiff's favor, and pending an appeal to the general term, were held entitled to have the suit revived against them, though the action itself was a personal action; on the ground that, though such revivor was not essential for the purposes of the then pending appeal, their right to appeal further, if advised, was necessary to be secured to them.

The death of a party, after judgment, and pending an appeal, does not, however, create an abatement, or render a revivor necessary, so far as that specific appeal is concerned. *Same case*.

Nor will the death of the party, after the hearing of a cause by the court, but before its actual decision, work an abatement. An order may, on the contrary, be obtained for the entry of the judgment *nunc pro tunc*, as of the day of the trial, and the remedy of the representative will be by appeal from that judgment. It is not analogous to the case where the plaintiff dies after trial, and before verdict. *Ehle v. Moyer*, 8 How. 244. See likewise, *Defendorf v. Howe*, 9 How. 243.

Where one of several joint plaintiffs dies, pending an action, the cause of which survives, the defendant cannot take judgment against the survivors, without an order that the action proceed in favor of the surviving plaintiff. That order is obtainable on the motion of either party, and is an absolute prerequisite. If omitted, the judgment will be irregular, and must be set aside. *Holmes v. Honie*, 9 How. 383.

In *Greene v. Bates*, 7 How. 296, it was held, in accordance with the views before laid down, that the proper course to be pursued by a defendant, in the event of a neglect on the part of the plaintiff's representative to revive, after abatement by the latter's decease, was to obtain an order, requiring the representative to file and serve a supplemental complaint of revivor within thirty days, or that the original complaint should be dismissed with costs.

In *Williamson v. Moore*, 5 Sandf. 647, the same course was held to be both admissible and proper, with reference to the representatives of deceased co-plaintiffs, with a view to secure, either a revivor or a dismissal of the complaint, so far as their interests were concerned, the cause of action in that case being one that merely continued, but did not survive. It was held that such an order was only obtainable on petition, and not on motion in the ordinary form. Such an order cannot however

be obtained, as against the other surviving co-plaintiffs. They, as such, had a right to proceed with the suit, without regard to the collateral interests. The suit, as to them, might be dismissed for want of prosecution, but not for a neglect to revive.

In *Taylor v. Church*, 9 How. 190, 12 L. O. 156, it was held that, where one of several joint plaintiffs, suing as partners, died, pending the suit, it was not necessary to obtain an order under sec. 121, to enable that suit to be continued by the survivors, but that the old course of entering a suggestion on the record, as provided by the Revised Statutes, was both admissible and proper to be pursued. The proceeding by motion, it was there held, was more peculiarly applicable to those cases where, under the old practice, the remedy was by *scire facias*. The course of obtaining an order under sec. 121, is, however, clearly admissible in all cases, and seems that most calculated to avoid ulterior difficulty.

### § 172. *Supplemental Pleading.*

The Code provides on this subject as follows:

§ 177. The plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply; alleging facts material to the case, occurring after the former complaint, answer, or reply; or of which the party was ignorant when his former pleading was made.

This provision is, as will be seen, in direct analogy to the plea "*puis darrein continuance*," under the old practice. Proceedings in the nature of a bill of revivor under the last section, fall necessarily under this section also, when the application is made more than one year after abatement.

A supplemental complaint, is not an addition to the original, but in the nature of another original complaint, which, in its consequences, may draw to itself the advantages of the former. *Furniss v. Brown*, not reported, *per Edmonds, J.*

Where the original assignee of trust property, made a defendant as such, had died before appearance, and a new trustee had been appointed in his stead by the court, it was held that the proper mode of making such new trustee a party, was by supplemental complaint. If he had been the only party defendant, a new original complaint would have been proper. *Johnson v.*

*Snyder*, 7 How. 395. It was also held, in that case, that the setting out the contents of the original, in the supplemental complaint, though perhaps unnecessary, was not a demurrable objection.

Where new matter, occurring subsequent to the service of the original complaint, requires to be pleaded, a supplemental complaint will, in all cases, be necessary. Such new matter cannot be introduced, by way of amendment of the original pleading; and, if so introduced, will be stricken out. *Hornfager v. Hornfager*, 6 How. 13, 1 C. R. (N. S.) 180.

This defect is, however, capable of waiver, by a defendant made a party by amendment, in case he appear generally. The insertion of allegations of this nature by amendment, is an irregularity, but does not render the pleading an absolute nullity, where no substantial rights are affected. *Beck v. Stephani*, 9 How. 193.

When cross actions, the one for assault, and the other for slander, had been brought between the same parties, and the defendant in slander had pleaded the assault of his adversary in mitigation of damages, and that action had been first tried, and a verdict for six cents damages found in consequence; the defendant in assault was allowed to put in a supplemental answer, pleading the facts of the former trial. *Bradley v. Houtaling*, 4 How. 251.

Although a supplemental answer is clearly a substitute for the old plea of "*puis darrein continuance*," it differs from it in this respect, that it may be put in at any time, and not, as formerly, with reference to the last continuance. When the facts sought to be pleaded, amount to an entire satisfaction of the cause of action, and, if established, will utterly extinguish the rights of the plaintiff, it is the duty of the court to allow the application, without regard to the time of its making. *Drought v. Curtiss*, 8 How. 56.

Where, however, the facts sought to be pleaded, were known to the defendant at the time of his former answer, leave to file a supplemental one was refused. *Houghton v. Skinner*, 5 Howard, 420.

A plaintiff who has continued an equity cause by bill of revivor and supplement, cannot afterwards discontinue, without payment of the costs of both suits from the beginning. *Fisher v. Hall*, 9 How. 259.

*Applications to be brought in, by Persons not Parties.*—Analogous to the subject of supplemental pleading, is the power of persons, not parties to the suit, but interested in its result, to apply for leave to be brought in as such, under sec. 122. This subject has, however, been already fully considered in the previous chapter on parties. See that chapter, sec. 31, and the cases there cited.

## BOOK VIII.

### OF PROCEEDINGS BETWEEN ISSUE AND TRIAL.

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#### CHAPTER I.

##### JOINDER OF ISSUE, GENERAL CONSEQUENCES OF, INCLUDING CONSOLIDATION OF CAUSES.

THE pleadings having thus been brought to a close, issue between the parties is now definitively joined, and ready for trial.

#### § 173. *Issue, generally considered.*

*Principal Issues.*—The issues so joined are thus defined by the Code, in secs. 248 to 251 inclusive:

§ 248. Issues arise upon the pleadings, when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact.

§ 249. An issue of law arises,

1. Upon a demurrer to the complaint, answer, or reply, or to some part thereof.

§ 250. An issue of fact arises,

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer controverted, either by the reply, or by the special provisions of sec. 168; or,
3. Upon new matter in the reply.

§ 251. Issues, both of law and of fact, may arise upon different parts of the pleadings in the same action. In such cases, the issues of law must be first tried, unless the court otherwise direct.



In *Van Gieson v. Van Gieson*, 12 Barb. 520, 1 C. R. (N. S.) 414, it was held that a sufficient issue was taken, by an answer averring payment of a promissory note sued upon, without any reply being put in; and the following definition of an issue is given: "An issue is joined, where there is a direct affirmation or denial of the fact in dispute; and it makes no difference whether the affirmative or the negative is first averred."

It will be seen that, by the above clauses, three distinct species of issue are created:

1. The issue of law pure: arising where the defendant demurs alone to the adverse pleading, without answering or replying to it, as to the facts.

2. The issue of fact: where the defendant simply answers or replies to such adverse pleading, without taking any separate objection in law thereto, or to any part thereof; and,

3. The mixed issue; where the defendant demurs to part, and answers part of the complaint, or demurs thereto by answer, in respect of latent defects; or, where, in like manner, the reply demurs in part to the answer, and alleges new matter in avoidance as to the residue.

The mode in which an issue, when joined, is brought to trial, and the preliminaries necessary for that purpose, will form the subject of the succeeding chapters.

*Characteristics of.*—The issue of law being complete upon the pleadings, no preparation is necessary for the purpose of bringing it to trial, except the ordinary proceedings of noticing and setting down the cause. In issues of fact, however, or mixed issues, various preliminary proceedings may be required, before the cause is in a fit state for submission to the court or jury; to the consideration of which, the chapters immediately succeeding will be devoted.

Though belonging more peculiarly to that portion of the work which treats of Trial, the case of *Warner v. Wigers*, 2 Sandf. 635, may be here noticed, as applicable to the provision that the issues of law shall be first tried, unless the court shall otherwise direct. The Superior Court there held that, where the issue of fact had been actually tried before the issues of law, without objection at the time, and on regular notice by both parties, it was to be deemed as having been first tried by order of the court; and the future practice of that tribunal was then an-

nounced to be as follows, viz.:—"That whenever a cause was moved on the trial calendar, in which there was an issue of law pending, the court would then determine whether the issue of fact should be first tried, or not, and it should not be necessary to obtain a previous order on the subject."

Another observation may be made with respect to mixed issues. In the case of demurrer by answer, where the facts in respect of which the demurrer arises, are, of necessity, controverted by the plaintiff, under the statutory general issue, provided for by the last amendment of sec. 168, a conjoint trial of the issues of law and fact is now inevitable, however the question might have stood previous to that enactment: unless the course suggested in the decisions below cited be adopted.

In *The Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1. (a case where the objection raised was the pendency of a cross action for relief, which the defendant was entitled to claim, under his answer as put in,) it was considered that a reference, to inquire whether the two proceedings were for the same cause, agreeably to the former chancery practice, would be the proper course. The point was not, however, directly decided, the motion having been denied on other grounds. This conclusion is supported by *Gresham v. Lyons*, 1 C. R. (N. S.) 348, where the same doctrine is held, with reference to the defence of another action pending, set up by answer. The practice is one of obvious convenience, and, in the event of a question of this nature arising, an application in the above form may be safely recommended. The principle that issues of law should be first tried, is recognized in *Cochran v. Webb*, 4 Sandf. 653.

[*Collateral Issues.*]—In addition to the above, another description of issue may be noticed, *i. e.*, issue upon a collateral fact, not joined upon the pleadings, but triable by express order of the court, in place of the feigned issue under the former practice. The provision of the Code in this respect is contained in sec. 72, and runs as follows:—

§ 72. Feigned issues are abolished; and, instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating, distinctly and plainly, the question of fact to be tried, and such order shall be the only authority necessary for a trial.

This form of issue is peculiarly applicable in divorce cases. See Rules 67, 68 and 69 of Supreme Court.

In cases not falling under section 253, and therefore primarily triable by the court, a special issue of an analogous nature may be obtained. See Rule 70.

In this case, a motion must be made for the purpose, within ten days after issue joined, and the court or judge may then settle the issues, or refer it to a referee to do so, as there prescribed. When once joined, this form of issue is triable in the ordinary manner.

*Preliminary Proceedings between Issue and Trial. General Notice.*—Before an issue of fact, either simple or mixed, can advantageously be brought to trial, several interlocutory proceedings may often be necessary or advisable. They may be divided into three general classes:

1. Proceedings with a view to bring on the trial of the issues joined, at once, without going through the ordinary forms.

2. Proceedings with a view to the more convenient or advantageous trial of those issues, in the ordinary mode.

3. Proceedings with a view to the preservation of the subject-matter of the controversy, *pendente lite*, or to the satisfaction of admitted portions of the plaintiff's demand:

Which will, accordingly, be treated of in the above order.

## § 174. *Consolidation of Causes.*

When more than one suit has been commenced by the same plaintiff against the same defendant, in respect of causes of action which may be joined, the latter possesses the power of moving that such proceedings be consolidated; and, where one of such suits is pending in the Supreme Court, that tribunal may order the proceedings in other courts to be consolidated with that within its own cognizance. This is a proceeding under the old practice. The statutory provisions on the subject will be found at 2 R. S. 383; the two first sections of art. IV., chap. VI. of Part III. The application should be made in the second suit commenced; if made in the first, it cannot be entertained. *Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1. The plaintiff also possesses the power of consolidating suits

commenced against joint and several debtors. See third section of same article. Where two suits for the same cause of action are pending in the courts of different States, although the pendency of such other suit in another State is not a ground of demurrer, (see *Burrowes v. Miller*, 2 C. R. 101, 5 How. 51,) nor can any order be made interfering with the jurisdiction of the sister tribunal; still, on manifest oppression being shown, the court will so far grant relief, as to suspend all proceedings in the New York cause, until the plaintiff shall have elected in which suit to proceed, and shall have suspended the other accordingly. *Hammond v. Baker*, 3 Sandf. 704; 1 C. R. (N. S.) 105.

The principle of compelling the defendant to elect was extended, in the *Farmers' Loan and Trust Company, v. Hunt*, 1 C. R. (N. S.) 1, and *Fabbricotti v. Launitz*, 3 Sandf. 743, 1 C. R. (N. S.) 121, to the case of a party, seeking to avail himself of matter pleaded by way of recoupment, and in respect of which he had likewise brought a cross action. It was decided that, on a proper application, (which, it was held in the former case, ought to be made in the cross action,) he might be put to his election, either to proceed in his suit, or to confine himself to his recoupment. "If he elect the former, then he may be prohibited from setting up the matter in this suit; if the latter, then the proceedings in the former action may be stayed."

Where, too, several suits against the same defendant depend upon one question, the court will stay those subsequent to the first, the defendant stipulating, if unsuccessful therein, to contest only the question of damages in the others. *Mac Farlan v. Clark*, 2 Sandf. 699.

In *Clark v. The Metropolitan Bank*, 5 Sandf. 665, where the plaintiff had commenced sixty-four separate suits for penalties, and which suits were divisible into two main classes, the motion for an actual consolidation was denied, in the first instance, but, on terms that the plaintiff was to notice and bring to trial one suit of each class, and that the proceedings in the other suits were to be stayed until after the trial of those selected: with liberty to the defendants in the remaining causes, after such trials, to renew their motion for a consolidation, or further stay; and a like liberty to the plaintiff to move for a consolidation, unless the defendants in the remaining causes should consent to abide the ultimate result of the proceedings in the former; in which event, the plaintiff was not to be entitled to any further costs, for putting the subsequent causes on the calendar.

The court, however, will not grant a remedy of this description, when the effect would be to prejudice the rights of any of the parties. Thus, when a receiver of the property of an insolvent corporation had been obtained, at the suit of a judgment creditor, under the statute, proceedings for the appointment of a receiver, at the suit of a creditor at large, were refused to be stayed; because, though the proceedings in the judgment creditors' action might be amended, so as to make it a proceeding for the benefit of all interested, it was in the option of the plaintiff whether he would amend or not; and, because a restriction imposed on the receiver in the proceedings under the statute, that he should do nothing in hostility to rights of the judgment creditor, deprived him of a power most essential to the doing complete justice in the premises. *Dambman v. The Empire Mill*, 12 Barb. 441.

The proper period for a motion of this description, is after answer put in; and, if the plaintiff amend his complaint, it should be deferred until after the second answer. *Leroy v. Bedell*, 1 C. R. (N. S.) 201. The form of notice for that purpose will be found in the Appendix.

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## CHAPTER II.

### OF PROCEEDINGS FOR THE PURPOSE OF BRINGING THE CAUSE TO A SPEEDIER DECISION.

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#### § 175. *Motion for Reference.*

THE proceeding for the above purpose, more peculiarly applicable to this stage of the action, is the motion for a reference; which, in effect, brings on the cause for immediate trial, without the necessity of its awaiting its turn, or taking its place upon the regular calendar of the court; and accordingly, when this course is admissible, it presents obvious advantages. References may be defined, as consisting of three kinds:

1. Reference of the whole issue, or of any one or more of the issues in the action, for decision by the referee.

2. Reference to take an account, for the information of the court.

3. Interlocutory references, of questions not bearing upon the main issue.

The succeeding observations will be confined more peculiarly to the subject of obtaining an order for any of the above purposes, at the stage of the action now under consideration; and the general incidents of the order thus obtained. The proceedings before the referees, when duly appointed, will be entered upon hereafter, in the chapter entitled Trial by Referees.

The reference, at this stage of the cause, may be either by consent, or on special application. The following are the provisions of the Code upon the subject, as contained in sections 270 and 271:

§ 270. All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties.

§ 271. Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case, the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

*By Consent.*—When the reference is by consent, of course there will be no difficulty in obtaining the sanction of the court to this proceeding. All that is required will be to obtain a regular order, upon the consent thus given. This can be done *ex parte* by a judge out of court; but the order, when obtained, should be duly served upon the opposite party.

In *Laudington v. Tuft*, 10 Barb. 447, where the parties had consented to appoint a referee, to take evidence and report, as though he had been appointed by order, it was held that they were concluded by their stipulation, and that no objection could be taken to the report, on the ground that no preliminary

decree had been made. See, also, *Whalen v. The Supervisors of Albany*, 6 How. 278.

In *Keator v. The Ulster and Delaware Plank Road Company*, 7 How. 41, an oral consent, given by the counsel for both parties, in open court, and acted upon by the entry of an order appointing a referee, was held to be binding, and that such consent, so acted upon, rendered a written stipulation unnecessary, and was a complete waiver of the right to require a trial in any other way, even though the cause was not otherwise referable. That right, once gone, could not be recovered, and the reference was, therefore, valid and binding.

A parol consent to refer, entered by the clerk of the court, or by the referees in their minutes, will also be effectual for the same purpose. *Leaycroft v. Fowler*, 7 How. 259.

A written consent, if obtained, must not be altered in any manner, or the proceedings under it will be wholly void, and the opposite party may disregard any order so obtained, and proceed to trial as if no consent had been given. *Haner v. Bliss*, 7 How. 246.

*By Motion, on Notice.*—Where, however, a consent cannot be obtained, it is competent for either party, at this stage, to make a formal application for the purpose. The reference on the motion of the court, belongs to a later period of the action, and will be treated of in connection with trial in general.

That the present is the proper stage of the action at which to make a motion of the above description, is evident from the case of *Enos v. Thomas*, 4 How. 290, where it was held that it is competent for the plaintiff to move to refer the cause, immediately the issue is complete by the service of a reply, and that, without waiting the expiration of the twenty days, during which the defendant is at liberty to amend his answer. Nor can a subsequent amendment defeat the reference, unless there thereby ceases to be an issue, either of fact or law, between the parties.

This last view is in analogy with that taken in *Cusson v. Whalon*, 5 How. 302; 1 C. R. (N. S.) 27, before cited, in relation to giving notice of trial.

The application should be made by motion, on due notice, and supported by affidavit of the party applying. Two circumstances must appear, positively and affirmatively, on such affidavit, viz.:

1. That the trial of the issue of fact joined, involves the examination of a long account.

2. That the investigation will not require the decision of difficult questions of law.

Both of these conditions are essential to the power of the court to grant a reference at all, at this stage of the cause, or extending to the trial of the whole issue. If difficult questions of law are involved, those questions must first be passed upon by the court itself; after which, if requisite, a consequential reference may be ordered, under subdivision 2 of sec. 271, for the purpose of carrying the judgment into effect. If a long account be not involved, the cause cannot be referred at all. Of course, these last observations only apply to the case of a reference adversely obtained. On a reference by consent, any issue whatever, whether of fact or law, and whether difficult or otherwise, may be referred, under sec. 270. See *Ludington v. Taft*, above cited.

If the motion be opposed, it is, of course, competent for the adverse party to bring forward affidavits in opposition; and, if he can make it clearly appear that difficult questions of law will arise, the application cannot be granted. The existence and nature of those questions must, however, be set forth clearly, and with sufficient detail, so as to enable the court to come to a conclusion, as to whether they are or are not of sufficient importance to debar the moving party from obtaining the facilities he asks for. The motion for a reference being in analogy with that under the old practice, the books on that subject may be consulted, with regard to this and other similar points. The former statute law on the question will be found in art. IV., title VI., chap. VI., of part III. of the Revised Statutes, 2 R. S. 383 to 386.

*Form of Application.*.]—The form of a notice of motion of the above nature, and of the ordinary affidavit in support, will be found in the Appendix.

The affidavit, as there given, should contain the names of a person or persons, not exceeding three, proposed as referees by the moving party, when he is prepared to name them, as he ought always to be. For the affidavits in opposition, it is, of course, impossible to give any definite form, as their nature must depend upon the circumstances of each particular case.



The only necessary remark appears to be, that the objection to the order should always be taken, in some portion of the affidavit, in the precise words of the statute, *i. e.*, "That the investigation will require the consideration of difficult questions of law," or, that the trial of the issue "does not require the examination of a long account;" and, where the reference is not objected to, *per se*, but the opposition is made on the ground of objections to the referees proposed, the party should give the names of a counter-referee or counter-referees, not exceeding three, as proposed on his part, in order to give the court an opportunity of making a proper selection. In case the parties cannot agree on this subject, the appointment now rests with the court in all cases. Under the Code of 1849, a more complicated system was provided with respect to New York causes; but that provision is now repealed, and the same form of practice is, for the future, to prevail throughout the State. The third referee, appointed under the provisions so repealed, was held in *Renouil v. Harris*, 2 Sandf. 641, 1 C. R. 125, 2 C. R. 71, to be competent to act at once, without any further agency on the part of the judge. In *Leaycroft v. Fowler*, 7 How. 259, a third referee was added by the consent of the parties, and an oral consent entered on the minutes of the two acting referees was held to be sufficient for that purpose.

The court possesses, however, the power of supervision in all cases, even where the referees have been actually agreed upon by the parties; and, unless it is satisfied that the selection is a proper one, the order appointing the referees so agreed upon may be denied, notwithstanding the stipulation; and, if the referees proceed without authority, their report will be null. *Litchfield v. Burwell*, 5 How. 341, 1 C. R. (N. S.) 42, 9 L. O. 182. In *Whalen v. The Supervisors of Albany*, however, 6 How. 278, it was considered that the stipulation between the parties is sufficient to confer jurisdiction upon the referee, and that the court would feel bound to cure the apparent defect, by the entry of an order *nunc pro tunc*: but, of course, this does not affect the principle laid down in *Litchfield v. Burwell*, that it is competent for the court to deny such an order, when not satisfied with the selection. It is clear that, in all cases, that order ought to be applied for and obtained in the first instance.

Though the original appointment or preliminary proceedings of referees may have been defective upon other points, still, if

the parties proceed before them without objection, the defect will be waived. *Renouil v. Harris*, 2 Sandf. 641, 1 C. R. 125, 2 C. R. 71; *Whalen v. The Supervisors of Albany*, before cited. See also *Garcie v. Sheldon*, 3 Barb. 232. The above doctrine does not, however, extend to the objection that the court had no jurisdiction to make the reference at all, which, on the contrary, may be raised at any time. *Renouil v. Harris* is also authority that a reference of "the cause," without limitation, embraces, as of course, the right to decide upon all or any of the issues joined in it. This branch of the subject seems, however, more properly to belong to the questions as to trial by referees, considered in a subsequent chapter.

In *McMaster v. Booth*, 4 How. 427, 3 C. R. 111, it was held that an action based on carelessness or negligence could not be referred, even although the examination of a very long account of items of damages was involved, and "the reasons for a reference, on the score of convenience and economy of time, were of the most cogent character." A leaning to the same conclusion is evinced in *Boyce v. Comstock*, 1 C. R. (N. S.) 290, and *Gray v. Fox*, 1 C. R. (N. S.) 334.

The former of these cases is based upon the view, that the provisions of the Revised Statutes above alluded to, under which actions on contract were alone referable, are unaffected by the Code. The broad language of section 271 of the latter, appears, however, to have been overlooked by the learned judge in pronouncing his opinion, and the authority of the case seems very questionable. A precisely contrary decision was given in *Sheldon v. Wood*, 3 Sandf. 739, 1 C. R. (N. S.) 118, where it was held that the Code authorizes a reference in all actions whatever; and one was accordingly granted in an action sounding in tort, the examination of a long account being involved in that case also.

Where, however, the actual taking of a long account is not necessarily involved, a reference to assess mere damages cannot be obtained. Damages, as such, should in all cases be assessed by a jury. *Hewitt v. Howell*, 8 How. 346.

In *W hale v. W hale*, 1 C. R. 115, an application for a reference to take testimony in a divorce case was refused, though made on the written consent of both parties, the adultery alleged being denied by the answer. The provisions in the rules of the Supreme Court, Nos. 61 to 71 inclusive, though authorizing and

rendering such a reference imperative, in cases of failure to answer, or omission to deny the allegations in the complaint, appear to exclude a case of the above nature, where an issue of fact has actually been joined. A reference to take testimony alone, seems, indeed, not to be within the provisions of the Code, above cited; unless perhaps upon collateral questions of fact not bearing upon the main issue, under the powers of subdivision 3. See *Flagg v. Munger*, 3 Barb. 9, 2 C. R. 17.

Had the consent been, on the contrary, to refer the issue so joined, there exists no doubt but that a reference of that nature might have been ordered. See anonymous decision to this effect, 3 C. R. 139.

In an action for divorce on the above ground, a reference cannot be granted, even after default, on a complaint not sufficiently specific. *Heyde v. Heyde*, 4 Sandf. 692.

Nor can such a reference be granted, where the wife is defendant, whilst the proceeding remains incomplete, for want of the appointment of a next friend. *Meldora v. Meldora*, 4 Sandford, 721.

Although, in general, where the examination of a long account is involved, it is almost a matter of right to ask for a reference; it is by no means a perfect matter of course to grant it in all cases. Thus, in *Sheldon v. Weeks*, 7 L. O. 57, where the examination of a long account was dependent upon the decision of the issues of fact in the cause, and would be altogether unnecessary, if the plaintiff failed to obtain a decree on those issues, a reference was refused. See to the same effect, *Graham v. Golding*, 7 How. 260.

It seems too, that, where the question between the parties has been narrowed to a simple issue, by stipulations on the part of the defendant, the court will not order a reference under these circumstances, though, under the pleadings as they originally stood, without regard to the stipulation, the examination of a long account would have been necessary. *Mullin v. Kelly*, 3 How. 12.

In *Stewart v. Elwell*, 3 C. R. 139, it was held that an account containing many items, yet being of a single purchase made at one time, was not a long account so as to warrant a reference; this view being in accordance with various cases decided to the same effect, under the old practice.

Where, however, the case does embrace the examination of

a long account, it is no objection to a motion for a reference, that it has once been tried by a jury. *Brown v. Bradshaw*, 1 Duer, 635, 8 How. 176.

In an action brought by an attorney, for professional services, a reference of the specific question as to the amount of compensation due, analogous to a taxation under the old practice, will be admissible; the amount so fixed will not, however, be conclusive on the trial of the cause, but may be enlarged or diminished by the jury. *Bowman v. Sheldon*, 1 Duer, 607, 11 L. O. 219.

In partition, where two or more of the parties interested desire to have their shares set off, to be enjoyed in common, (see Laws of 1847, p. 537,) an interlocutory order of reference will be granted for that purpose. *Northrop v. Anderson*, 8 How. 351.

An order of reference, in a case referable in its nature, is not appealable. *Bryan v. Brennan*, 7 How. 359; *Dean v. The Empire State Mutual Insurance Company*, 9 How. 69.

When once the cause is before the referee, the court will not interfere with his discretion on the subject, even at his own request. The parties must wait till the report has been made, and then come to the court for its opinion. *Schermerhorn v. Develin*, 1 C. R. 28. For further remarks on the subject of references in general, see the subsequent chapter on trial by referees, above alluded to.

Another class of references, of an analogous, and yet of a distinct nature from the above, are those in the real estate proceedings of partition, foreclosure, and admeasurement of dower, and likewise in divorce, where no issue of fact has been raised upon the pleadings, as to the right of the plaintiffs to obtain those remedies. They are, in some measure, analogous, inasmuch as the whole of the questions in the suit are, in fact, decided in these cases by the referees; and yet they are distinct, inasmuch as the proceeding there taken is more in the nature of one for carrying into effect a judgment previously obtained by default, than of pronouncing a decision in the cause. Such references partake, in fact, of the nature of special proceedings, though mentioned here, inasmuch as the proper time for applying for them is immediately upon the completion of the pleadings. In relation to partition, see *Northrop v. Anderson*, above cited.

Interlocutory references, and references for the information of

the court, will, as before stated, be hereafter considered under their proper divisions.

### § 176. *Other Proceedings.*

*Motion to dismiss.*—Before passing on to the next head proposed, the subject of the defendant's remedy, in case of unreasonable delay on the part of the plaintiff, remains to be considered. His course, in the event of the latter's neglect to serve a copy of the complaint, after demand, has been before adverted to.

By section 274, the following provision is made in the former respect: "The court may also dismiss the complaint, with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served."

By Rule 21 of the Supreme Court, the practice on this description of application is thus defined and laid down:

Whenever an issue of fact shall have been joined in any action, and the plaintiff therein shall fail to bring the same to trial, according to the course and practice of the court, the defendant may move for the dismissal of the complaint with costs.

If it is made to appear to the court that the neglect of the plaintiff to bring the action to trial was not unreasonable, the court shall permit the plaintiff, on payment of costs, to bring the said action to trial, at the next Circuit Court, where the same is triable.

The rule above cited is, in effect, a continuation of the former chancery practice on a motion to dismiss for want of prosecution, the former remedies being extended, so as to embrace the case of the plaintiff's neglect to serve the summons upon other defendants. As yet, no case appears to have arisen upon this last branch of the section, though this subject of relief might be of great importance, under certain circumstances, and in cases of joint and several liability.

The proper period for a motion to dismiss for want of prosecution, is evidently that at present under consideration, viz: the intermediate stage between the joinder of issue between the plaintiff and the defendant making such application, and the actual trial of the cause. This motion must not be confounded with the taking of judgment by default, when the cause is re-

gularly called on; a proceeding widely different in its nature, though analogous in its practical effect.

The motion for this purpose must, of course, be brought on upon the usual notice, and must be grounded upon an affidavit, showing the neglect complained of. The notice should follow the exact words of the section and rule above cited, or both, adapted to the exact state of circumstances complained of. The same rules should be observed with respect to the affidavit.

In cases where there has been a neglect to revive an abated suit, on the part of the representatives of a deceased plaintiff, a motion of this nature will be the proper course. See this subject fully considered, and cases cited, in the last chapter of the preceding book, under the head of Revivor.

In *Hoyt v. Loomis*, 1 C. R. 128, it was held, (as appears clear from the provisions themselves,) that any one defendant in a suit is entitled to make a motion of this description, notwithstanding the others may not have answered. See, likewise, *Luce v. Trempert*, 9 How. 212.

A defendant, who has not been served, cannot, however, voluntarily appear and make a motion of this description, where his rights are not positively affected. *Tracy v. Reynolds*, 7 How. 327.

In an equity suit, pending before the Code, a motion of this description was refused, when the defendant himself was in a situation to notice the cause, and take a judgment by default in the usual manner. It is proper, only when there are other defendants, against whom the cause is not in readiness for hearing, in consequence of the plaintiff's neglect to expedite. Per *Edmonds, J.*, in *Lee v. Brush*, 3 C. R. 165, subsequently more fully reported, 3 C. R. 220. This doctrine does not, however, appear to hold good, in relation to causes of the ordinary description.

In *Cusson v. Whalon*, 5 How. 302, 1 C. R. (N. S.) 27, it was held, that a defendant in a suit under the Code, may move for a dismissal of the complaint with costs, under this section, without noticing the cause. The mere calling such an order a judgment as in case of nonsuit, in the notice of motion, does not mislead, and will be disregarded. Undoubtedly, the more correct practice will be to follow the words of the section.

It was likewise held, that the defendant will be in a situation to make a motion of this description, if the plaintiff fail to bring

on the cause, the first circuit or term after issue has been actually joined by the service of a reply, provided the defendant's time to amend have then elapsed, or in case he have waived that right, by noticing the cause for trial himself, or otherwise. It seems, however, that a defendant cannot obtain any thing beyond a dismissal of the complaint, under this section; and that, if he require other relief against the plaintiff, his only remedy will be to bring on the cause for trial, on the usual notice. See *Wilson v. Wheeler*, 6 How. 49, 1 C. R. (N. S.) 402.

The last conclusion is affirmed by *Roy v. Thompson*, 1 Duer, 636, 8 How. 283. It is also held, that an omission on the part of the defendant to notice the cause, will not prejudice his right to move, on his showing, by affidavit, that the cause was at issue in time to have been set down, and that, at the term for which it ought to have been noticed, younger issues have been tried.

The motion for this purpose, when made by a defendant who has attended prepared for trial, but has not noticed the cause, and grounded upon the plaintiff's failure to bring it on at the circuit, must be made with due diligence, and should be noticed for the earliest succeeding term. If not so made, costs may be refused to be imposed. See *Whipple v. Williams*, 4 How. 28.

In *Bishop v. Morgan*, 1 C. R. (N. S.) 340, where the plaintiff had served the summons on one defendant, and noticed the cause for trial, but failed to bring it on, in consequence of his inability to serve another who was absent from the State, and the defendant served, had not himself noticed the cause; a motion to dismiss, on the part of the latter, was granted, unless the plaintiff should pay the costs of the term and of the motion, and stipulate to bring on the cause for trial next term. "The court had come to the conclusion," it was said, "that the Code contemplated such a motion in a case like the present; and that, if the plaintiff notices a cause for trial, and puts it on the calendar, he is bound to bring it to trial when it is reached."

In *McCarthy v. Hancock*, 6 How. 28, 1 C. R. (N. S.) 188, where the defendant alone had noticed the cause for trial, but had omitted to move at the circuit, on the plaintiff's default to appear, it was decided that he could not subsequently move, under the provisions above cited.

Where a defendant, otherwise entitled to move to dismiss, had been offered his costs of the circuit by the plaintiff, but

had neglected to take any steps to make out or adjust them, so as to enable him to give the plaintiff notice of the amount, and to be prepared to receive them, his motion for the above purpose was denied, with costs. *Hawley v. Seymour*, 8 How. 96.

In *Williams v. Sage*, 1 C. R. (N. S.) 358, it was held that a motion of this description was not admissible on the part of a defendant, on the ground of the plaintiff's having declined to proceed with the hearing of the cause before a referee; and the application was denied accordingly, though the referee had refused to proceed *ex parte*. See *Holmes v. Slocum*, 6 How. 217, 1 C. R. (N. S.) 380. The "referee," it was held, "should have proceeded on the defendant's notice, and, in the absence of evidence on the part of the plaintiff, reported in favor of the defendant," and the latter's proper course was to obtain such a report. See, likewise, *Thompson v. Krider*, 8 How. 248. See, also, this question as hereafter considered under the head of Trial by Referees.

In *Crawford v. Whitehead*, 1 C. R. (N. S.) 345, an order to dismiss was granted, the plaintiff being dead, leaving no personal representative within the State; and no definite prospect of a revivor being shown, beyond the mere expression, on the part of the plaintiff's attorney, of a hope to be able to get one appointed.

A defendant may lose his original right to move for a dismissal, by improper delay. Thus, where a notice that no further proceedings would be taken, had been served on behalf of the plaintiff, but the defendant continued to put the cause on the calendar for a number of terms, and afterwards moved that the cause be discontinued, the motion was denied, the plaintiff being then desirous of proceeding; and it was held that the defendant should have moved for a dismissal of the cause, if reached during the term in which the plaintiff's notice was received, or, if not, then at the special term; and that he could recover no costs for the subsequent notices, which were characterized as a needless proceeding.

A motion of this nature is maintainable, in respect of an incurable defect in the complaint, at any stage of the proceedings, however advanced. *Burnham v. De Bevoise*, 8 How. 159.

*Voluntary Dismissal by Plaintiff.*—It is, of course, competent for a plaintiff to move to dismiss his own complaint, at any time



before trial, on payment of costs to the defendants who have appeared, and possibly without such payment, under circumstances of hardship, where he has been taken by surprise by the defence; as, for instance, by the pleading of an insolvent's discharge, when the fact of such insolvency was unknown to him at the time the suit was first brought. A plaintiff, however, who has once obtained a decree, cannot afterwards obtain an order to dismiss his own bill, unless with the consent of all the defendants. *Picabia v. Everard*, 4 How. 113.

*Short Causes, Hearing of, in First District.*]—The following special Rule has been made by the judges of the Supreme Court in this district, in analogy to the English practice in Chancery, of setting apart one day in each week, for the hearing of short causes, certified as such by counsel. It has been and is extensively acted upon, and is eminently calculated to obviate, in part, the inconvenience occasioned by the great pressure on the Circuit Calendar in that district. A plaintiff, adopting this course, adopts it, however, at the risk of his cause losing its original priority, in the event of the application being made, in a case really and properly contested by the defendant, and not capable of being fitly disposed of within the limited time allowed. The courts are strict in enforcing this penalty under these circumstances, and the result of such an application, so made, will be delay, instead of acceleration.

The following is the order in question :

#### SPECIAL CIRCUIT CALENDAR.

At any circuit, until further orders, any causes belonging to either of the two following classes, may be placed on a special circuit calendar, unless the trial is likely to occupy more than one hour :

1st. Where the action is on contract, and the answer merely denies the allegations in the complaint, without setting up any new matter.

2d. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defence is made only for the purposes of delay.

To entitle the cause to be placed on such calendar, the plaintiff's attorney must give notice, four days before any Monday in the circuit, that he will move on such Monday to have the cause placed on such calendar; and the motion will be heard on such Monday, and, if granted, the cause may be heard on the following Friday.

If the motion be founded on the belief that the defence is for delay, affidavits must be served at the time of notice.

The plaintiffs attorney must also deliver to the clerk of the circuit, a like notice also, four days before such Friday, containing also the number of the cause on the general circuit calendar.

The same motion may be made on any day before the judge at chambers, on notice of four days.

If the cause shall actually occupy more than one hour on the trial, the trial may be suspended at the discretion of the court, and the cause be put down at the foot of the calendar.

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## CHAPTER III.

### OF THE CHANGE OF VENUE.

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THIS subject has been partially entered upon in a previous chapter, in reference to the ordinary application, on the ground of the venue being laid in a wrong county, on demand to that effect under section 125; that form of proceeding can only, however, be adopted before answer, as there provided. See that chapter and the cases there cited, as respects that form of application, and likewise as to the question as to what will or will not be considered the "proper county," with reference to the nature of the proceeding, the residence of the parties, or the jurisdiction of the court. It will be there seen that, in actions of a strictly local nature, the demand that the trial be had in the proper county is a matter of right; and, likewise, that the convenience of witnesses will form no bar to application on the preliminary ground in the first instance, if made in due time.

The application now in question is of a totally different nature, and is inadmissible altogether at the stage of the action at which the other is appropriate, resting, as it does, on wholly different grounds.

### § 177. *Motion to Change Venue.*

*Powers of the Court.*—In the Codes of 1848 and 1849, no provision whatever was made, as regards this branch of the subject, though relief of that nature was uninterruptedly administered by the courts, under their former powers. Express provision is, however, now made by the amendment of 1851, in the latter portion of section 126, which runs as follows :

The court may change the place of trial in the following cases :

1. When the county designated for that purpose in the complaint is not the proper county.
2. When there is reason to believe that an impartial trial cannot be had therein.
3. When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

It would seem by this section as it now stands, that the court possesses power to change the venue at any time, on the ground that it has been laid in the wrong county, even though the defendant may have omitted to make a demand to that effect in the first instance, as provided for by the preceding clause. The more usual grounds, however, on which an application of this nature will have to be made, will be those named in the second and third subdivisions.

The practice on motions of this description is now distinctly defined by Rules 44 and 45 of the Supreme Court, which run as follows :

**RULE 44.**—No order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers, that the defendant has used due diligence in preparing for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any step, except giving notice and subpoenaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order, an affidavit, showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke

the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

RULE 45.—In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action, or the defence, or both of them, arose. Additional facts will be taken into consideration by the court, in fixing the place of trial.

*Mode of Application.*—The above rules settle the question as to the proper time of making a motion this description. It is only appropriate after issue joined, but then it must be made at once and without delay, or the remedy will be lost.

Before the adoption of those rules, the question as to the proper period for making this peculiar application was much debated. In one class of cases it was held that it was only appropriate at the outset of the cause, and before issue joined. See *Beardsley v. Dickerson*, 4 How. 81; *Schenck v. McKie*, Id. 246, 3 C. R. 24, and *Myers v. Feeter*, Id. 240. In another, the view was taken which has since been carried out in the rules above cited, viz.: that immediately upon the joinder of issue will be the fitting period. See *Lynch v. Mosher*, 4 How. 86, 2 C. R. 54; *Clark v. Pettibone*, 2 C. R. 78; *Barnard v. Wheeler*, 3 How. 71; *Mixer v. Kuhn*, 4 How. 409, 3 C. R. 106; *Hartman v. Spencer*, 5 How. 135. See likewise, *Mason v. Brown*, 6 How. 481; *Hinchman v. Butler*, 7 How. 462. The actual joinder of issue will govern, without regard to any objections that may have been informally made: as, for instance, in relation to a reply objected to, but unsustainably, on the ground of imperfect verification.

The application must be made upon notice of motion, which should be in the usual form, following the exact words of the subdivision on which the application is grounded, and it should include in its terms an interim stay of proceedings, if such stay be requisite, as, otherwise, no measure on the part of the plaintiff will be suspended, except only the actual preparations for trial. See Rule 44. A form is given in the Appendix. The motion must, as before stated, be made with all possible diligence. The proceeding is, in all respects, similar to that under the old practice, the books as to which, and the cases there cited, may be consulted. See, in particular, Note at 4 Hill, 62, (*Brittan v. Peabody*.)

It must be grounded on affidavit made by the party himself,

or reasons shown why it is not so made, in the same form as was usual under the former practice; and, as heretofore, it is absolutely essential that the usual affidavit of merits should either be incorporated in, or should accompany that moved on. See *Lynch v. Mosher*, 4 How. 86; 2 C. R. 54; and *Mixer v. Kuhn*, 4 How. 409, 3 C. R. 106, before referred to. See also, *Jordan v. Garrison*, 6 How. 6, 1 C. R. (N. S.) 400. The affidavit of merits, and its requisites, will be found considered hereafter, under the head of Preparations for Trial.

The affidavit itself must conform in all respects to Rule 44, as above cited. See form in Appendix. Though couched in language of permission, the wording of that rule amounts, in fact, to a requisition that the affidavits on such an occasion should be explicit on the points there referred to.

It is not necessary to make any formal demand whatever, preliminary to a motion of this description, as in the case of an application under subdivision 1 of the section in question. *Hinchman v. Butler*, 7 How. 462.

Prior to the making of the rules above cited, it was held that the delay of a term would not be a positive bar to a motion to change the venue, unless the defendant had been clearly guilty of *laches* in not moving earlier: if such were the case, it would form a sufficient ground for denying the motion. *Lynch v. Mosher*, 4 How. 85, 2 C. R. 54, before cited. In that case, however, although *laches* had been committed, in not moving at once, the plaintiff had not suffered by it, in consequence of an accidental circumstance, which would have prevented the cause from being tried, if it had been regularly on the calendar. Under these circumstances, liberty was given to the defendant to renew the motion, (which was denied on other grounds,) provided he did so at once, and so as not to delay the plaintiff. It seems doubtful whether this doctrine holds good, under the rules, as they now stand.

*Motion on ground of Prejudice.*—On the motion under subdivision 2, it will evidently be necessary to make out a very clear case, showing that an impartial trial cannot be had, in the district nominated by the plaintiff. The bias of the courts will be strongly in favor of retaining the place of trial, unless "the inability to obtain a fair and unprejudiced jury be clearly established." *The People v. Wright*, 5 How. 23; 3 C. R. 75. The

mere existence of excitement in the county, and of the matter in question having been the subject of newspaper discussion, and the expression of the belief of the witnesses who swore to those facts, that it was "very doubtful" whether a fair and impartial trial could be had in the county of venue, were there considered insufficient grounds for a change, on the ground of local prejudice. The cases under the old practice will be found collected in the opinion. The exertion of undue or improper influence on the part of one of the parties, if sworn to, would, however, in all probability form a sufficient ground for such a motion. See *The People v. Webb*, 1 Hill, 179, as there commented upon.

*Convenience of Witnesses.*—The same case, *i. e.*, *The People v. Wright*, is very explicit on the subject of motions under subdivision 3, *i. e.*, for a change on the ground of the convenience of witnesses. The county in which the majority of the witnesses reside, irrespective of the distance which those witnesses might have to travel, was there held to be the governing principle in all instances; and the case of *Hull v. Hull*, 1 Hill, 671, is referred to as settling the practice in this respect. The conclusion of the court is laid down in the following terms: "It appears, then, that there is a very large number of witnesses residing in the county of Rensselaer, whose convenience will be best promoted by trying the cause there, and that all the facts to be inquired into arose in that county. That is, therefore, emphatically the proper place for trial." These views require some qualification, as appears by the cases below cited.

If, however, it is patent upon the pleadings, that the issue, on which witnesses, resident in another county, are alleged to be requisite, is obviously untenable, the motion will be denied. *Hartman v. Spencer*, 5 How. 135.

The earlier cases on the subject of the change of venue will be found collected, 4 Hill, p. 629, *et seq.*, in the note to the case of *Brittain v. Peabody*, above referred to. It is clear from them that, if the defendants positively swear to a greater number of material witnesses than the plaintiff, the change of venue is, *ceteris paribus*, almost as of course. The plaintiff, in opposing such a motion, must make, too, an unqualified affidavit. *Sherwood v. Steele*, 12 Wend., p. 291. In that case plaintiff swore to one more witness than the defendant, but in a qualified manner, under which circumstances the motion was granted.

Although the greater number of witnesses is the more usual element which will govern the decision, it will not do so as of course in all cases. The value of their testimony, to be shown under the advice of counsel, will also be taken into consideration, with reference to the granting or denying such a motion. *Anon.*, 1 Hill, 668. This last principle was fully carried out by *Harris, J.*, in *Bernard v. Wheeler*, 3 How. p. 71, who states the law as follows: "In determining the question between the parties, a preponderance of witnesses, to say the least, should not be regarded as a controlling circumstance. The experience of the entire legal profession, for many years, has painfully proved, that very little can be learned from affidavits, made upon a motion to change the venue, as to the real number of witnesses who will, in fact, be required to attend upon the trial of a cause. The courts are authorized to order the cause to be tried in another court, *on good cause shown therefor*. In determining whether such cause has been shown, the court can generally rely more safely, upon the nature of the case to be tried, and upon the facts and circumstances, connected with the transactions which are the subject of investigation in the cause, than the number of witnesses sworn to be material by either party."

The advantage of the affidavit on which the motion is grounded being full and explanatory, is evidenced by the case of *Jordan v. Garrison*, 6 How. 6, 1 C. R. (N. S.) 400. The defendant there named sixteen witnesses, and swore specifically as to the testimony to be given by them. The plaintiff swore to eighteen witnesses in the county of venue, and also stated the effect of their probable testimony. Only one of those witnesses, however, appeared to be clearly necessary, and the plaintiff had not denied or explained away any of the statements in the defendant's affidavit. The court, under these circumstances, laid down the principle that the place of trial of a transitory action, should be in the county where the principal transactions between the parties occurred, and where it appears the largest number of witnesses who know any thing of the transaction sued upon reside. A bare majority of witnesses sworn to will not necessarily control, unless their testimony be shown to be material and necessary. A clearly exaggerated statement as to the number of witnesses will not avail either party; and will even be looked upon as a fraud on the court. See *Wallace v. Bond*, 4 Hill, 536.

In *The People v. Hayes*, 7 How. 248, it is laid down that

"Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it be shown wherein they are material." Sec, likewise, to the same effect as the above, *Hinchman v. Butler*, 7 How. 462.

Similar principles to the above are held in *King v. Vanderbilt*, 7 How. 385. In deciding motions of this description, courts now, it is said, look beyond the affidavits of the parties, and the advice of their counsel, to the pleadings, and the issues to be tried, and determine from the whole case, in which county the trial will accommodate the greatest number of witnesses, whose attendance it will be necessary for the parties to secure, in the reasonable exercise of care and prudence in preparing for trial. The convenience of witnesses is the main consideration, but the mere excess of numbers does not always control. The possible delay, arising from a change of venue, as asked for, will also not be overlooked.

In *Goodrich v. Vanderbilt*, 7 How. 467, it is held, however, that, where the transaction arose in the county to which the venue is sought to be changed, the rule will be to change the venue, unless the preponderance of witnesses is so great, as to warrant the court in retaining the original place of trial. The suggestion of inconvenience with regard to the overcrowded calendar of the proposed county, was there obviated, by granting the plaintiff an election, within twenty days, to have the trial in one of the neighboring counties to New York, the one there in question, subject to which election, the order was granted.

In *Mason v. Brown*, 6 How. 481, it was held that the actual county of the residence of the witnesses, does not govern, so much as their real and practical convenience. Thus, where four witnesses for the plaintiff resided within one mile of the actual place of trial, and the transaction in question had arisen at that very place, whilst the defendants' witnesses, six in number, were required to prove general facts which occurred at a distance from their actual residence, the venue was retained. The strict doctrine as to the residence of witnesses, as laid down in the cases under the old practice, and also in *The People v. Wright*, before referred to, is therefore qualified to that extent.

It is evident, from the most of the foregoing cases, and especially from *Mason v. Brown*, *Hinchman v. Butler*, and *Goodrich v. Vanderbilt*, that the place where the cause of action arose, forms a very important element in questions of this nature, and,



where the other grounds for asking or opposing a change are nearly balanced, will, as a general rule, be decisive of the question.

The courts will not, though, be necessarily governed by this consideration, if it be shown that there are more witnesses necessary to be called upon the trial, residing in another county. *Beardsley v. Dickerson*, 4 How. 81.

The place of trial was accordingly changed in that case, on those grounds. Both parties, too, resided in the county in which there was a majority of witnesses, which was stated by the court, as one amongst the reasons for granting the change asked for.

The convenience of witnesses cannot, however, be brought forward, as an objection to the formal motion for a change of venue into the proper county. The consideration of that question belongs to a different stage of the cause. *Park v. Carnley*, 7 How. 357.

The plaintiff may oppose a motion of this description, on the ground that he has himself material and necessary witnesses in the county of venue, or near it, within the State; and, if he swears unqualifiedly to a number, equal to or greater than that brought forward by the defendant, and it appears that such statement is made *bonâ fide*, and the balance of material testimony is really in his favor, it seems that the venue will be retained almost as of course, though not of necessity. See the different cases above cited, and the views there held on the subject.

Under the Code of 1849, it was held that a change of the place of trial did not carry with it a change of the venue for other purposes, but that, on the contrary, all interlocutory applications must still be made in the county originally fixed. See *Gould v. Chapin*, 4 How. 185; 2 C. R. 107; *Barnard v. Wheeler*, 3 How. 71; *Beardsley v. Dickerson*, 4 How. 81; *Lynch v. Mosher*, 4 How. 86; 2 C. R. 54; and *Moore v. Gardner*, 5 How. 243; 3 C. R. 224. The same also was held with reference to the trial of an issue of law, in *Gould v. Chapin*, above cited, and *Ward v. Davis*, 6 How. 274. The same is likewise implied in *Clark v. Van Deusen*, 3 C. R. 219; though, in that case, the court looked into the materiality of such issue, and, on its clearly appearing to be untenable, refused to entertain the objection.

The recent amendment provides against this inconvenience, and effects a change of venue, and the consequent transfer of

all papers and proceedings accordingly, in all cases where a change of place of trial has been granted, unless express provision be made to the contrary, either by consent of the parties, or order of the court. See likewise, *Mason v. Brown*, and *Hinchman v. Butler*, above cited.

In *Northrop v. Van Dusen*, 5 How. 134, 3 C. R. 140, it is held that, in motions of this description, costs to abide the event will, as a general rule, be allowed, if asked for in the notice, but, if not, the court has no power to make the order. This precaution should therefore be taken in all cases. See form in Appendix. The power of the court to give costs of that nature on such a motion, or indeed under any circumstances, has however been doubted. See *Johnson v. Jillitt*, 7 How. 485.

*Defendant's Course, on Order.*—On a change being granted, the defendant's attorney will, of course, see that all papers and proceedings are duly transferred to the clerk of the substituted county, according to the provision above referred to. In strictness, this is the duty of the clerk of the court, on the order being filed with him, (which must of course be done,) and he is the responsible party in all cases; but still it should always be looked to, both as regards the transmission and the due filing of the proceedings in the substituted county, when transmitted; in order to insure regularity, and avoid future inconvenience.

*Revocation of Stay, on Plaintiff's Application.*—The plaintiff's remedy, in respect of a stay of proceedings, unduly obtained by the defendant, for the purposes of a motion as above, is pointed out by Rule 44. On affidavit, showing such facts as will entitle him to retain the venue according to the settled practice, he may obtain a revocation of the order to stay, from the officer who granted it. This application may be made *ex parte*, but immediate notice of the order of revocation must be given to the defendant's attorney. Of course, this revocation only operates as regards the interim stay of proceedings, and the motion itself will still come on, and be decided on its merits, in due course. If the defendant consider himself aggrieved by a revocation so obtained, his better course would be to obtain a fresh order, to show cause why the stay should not still be granted, with the usual clause, suspending proceedings until the return

of that order. It would, doubtless, be competent to him, in such a proceeding, to meet the affidavit, on which the plaintiff has obtained the revocation, by counter-affidavits on his part either evidencing his own right to require a change, or impeaching the plaintiff's statement.

*Disqualification of Judge, Change for.*—The last point to be noticed, is the change of venue, in consequence of the justices of the district in which the action is triable, being disqualified, on the ground of interest, relationship to the parties, or employment as counsel in the matter. This subject is specially provided for by c. 15 of the Laws of 1850, p. 20, as regards actions in the Supreme Court : which enacts that, in such cases, the court may, upon special motion, order the action to be brought to argument in any adjoining district to be specified in such order, and then, such cause shall be heard and decided in such district. This measure is, of course, inapplicable to courts of strictly local jurisdiction, the disqualifications as to which, where existent, are positive and irremovable.

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## CHAPTER IV.

### OF PROCEEDINGS FOR OBTAINING AN INSIGHT INTO THE ADVERSARY'S CASE, OR FORTIFYING THAT OF THE MOVING PARTY.

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THE measures for the above purposes, are mainly remedies existent under the old practice, and unaffected by the Code, or else more properly referable to the class of special proceedings. The latter will be considered in the present division of the work, such being the more convenient arrangement ; a detailed notice of the former is incompatible with the plan proposed at the outset.

All, however, may be conveniently alluded to at this juncture, in order that the attention of the practitioner may be directed to all the different measures peculiarly applicable to this stage of the action, and which it may be in his power to adopt, with a view to the proper preparation of the cause for trial.

### § 178. *Enforcement of Admission.*

The first of the proceedings in question is one which, though associated in the Code with the provisions for enforcing the discovery of books and papers, is yet distinguishable from those provisions, inasmuch as it is in the power of the party to act under the latter at any time, whilst the former belongs to this stage of the action exclusively, and would not be appropriate at any other. Although given by the same section as the provisions above alluded to, which belong unquestionably to the class of special remedies; this, on the contrary, partakes rather of the nature of an ordinary step in the cause.

The enactment in question is contained in the earlier portion of sec. 388, and runs as follows:

§ 388. Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper, material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense, in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission; unless it appear, to the satisfaction of the court, that there were good reasons for the refusal.

Although not prescribed in terms, the more convenient course will be, to accompany the exhibition of the document with a written notice, and request for an admission as above; the proof of the giving of which notice will, in case of refusal, be more convenient and more satisfactory to the court, than the adduction of exclusively verbal evidence. In ordinary cases, a refusal is not to be anticipated, and the party applied to will consider well before he gives one; as, if he take that course, he does so at the risk of the imposition of costs. Where, however, any real question exists, as to the genuineness of the document of which an admission is sought, such admission would clearly be imprudent; and many other cases might be suggested, in which, on a *bonâ fide* refusal, on adequate grounds, the court would never impose costs.

Questions extending merely to the construction or purport of the instrument adduced, apart from any as to its genuineness, or where, as must frequently be the case, the genuineness of it is

not in question, though its real effect is, may easily be guarded against, by a special form of admission; and, indeed, no properly drawn request will require more, than a mere dispensation from the necessity of giving technical evidence of the existence of such an instrument.

In the event of an admission being refused without good reason, and expenses being incurred in consequence of that refusal, counsel should be careful to be prepared with a statement, and to ask for them, at the trial itself, as this course is expressly prescribed by the section; and, if omitted, it is very doubtful whether those expenses can afterwards be allowed in the taxation of costs. It seems, indeed, clear that they cannot.

### § 179. *Discovery, &c. Anticipatory Notice.*

The next proceeding for the purposes above mentioned, and which is, also, one open to either party, is the procuring an inspection and copy, or permission to take a copy, of books, papers, or documents in the hands of his adversary. It would be needless to enlarge upon the importance of doing this at once, if not already done at an earlier stage, in every instance where such documents exist. The subject has already been touched upon, under the head of the Defendant's Proceedings before Answer, and will be fully gone into in the chapters which close this division of the work.

Not merely has the party a right to inspect the documentary evidence in his adversary's possession, but he has also a right to examine that adversary himself, upon oath, at any time before the trial, under the provisions of chapter VI., title XII., part II. of the Code. This proceeding is in evident substitution for the old chancery practice on a bill of discovery, and likewise as to the examination of the defendant, upon interrogatories annexed to, or forming part of the complaint. It is one peculiarly applicable to this stage of the action, though, as before noticed, under the head of Proceedings before Answer, it may be taken earlier. See this subject fully considered in the closing chapters of this division.

In numerous classes of cases, and more especially in those which, under the old practice, would have belonged to chancery jurisdiction, the importance of this step is too obvious to

admit of doubt. In strictly common law cases, it will, on the contrary, be less generally applicable. The examination so taken, may be read upon the trial, if the party is not then called upon to testify as a witness; but, if he be so called, it then becomes, *ipso facto*, a nullity, and, even if he be called to testify on one point only, the whole ground must be gone over again. When read, such examination will, of course, be open to all due exceptions, precisely as with reference to the written testimony of witnesses not produced at the trial, as next referred to.

### § 180. *Depositions de bene esse.*

The means which at present exist for taking the evidence of witnesses, accessible at the time, but whose testimony may not be available at the trial, is the next point to be considered, where circumstances of this nature may exist. This may be done as heretofore, by an examination "*de bene esse*," under the powers given for that purpose in the Revised Statutes, art. I., title III., chap. VII. of part III., 2 R. S. 391 to 393. The old practice in this respect, remains perfectly unchanged by the Code, and may be gathered from the works on that subject. The order for this purpose is obtainable from a judge of the court in which the action is pending, if a court of record, *ex parte*, on affidavit of the facts; and copies of both the order and the affidavit must be served upon the opposite party. The omission to give proper notice to him will be sufficient to prevent the reading of the deposition. 2 R. S. 393-8-9. *Nixon v. Palmer*, 10 Barb. 175. The time for the proposed examination must be limited in such order, and must not exceed twenty days from its date; but, within that limit, the appointment for that purpose rests in the discretion of the judge applied to. It is competent for the adverse party to show cause against proceeding on this examination, on proof that it is unnecessary, or that the order has been collusively obtained. If he do not oppose, or fail in bringing proof of this nature, the officer granting the order proceeds with the examination of the witness in due form; and the written deposition, signed by the witness, and certified by such officer, must be filed in the office of the clerk of the court in which the action is pending, within ten days, and may then be used on the trial, on proof previously given, that the

witness is unable to attend, but not otherwise; and it is competent for the adversary to prevent the reading of it, by proof that the witnesses' attendance could have been obtained on sufficient notice, (see *Weeks v. Lowerre*, 8 Barb. 530,) or that the examination was not duly conducted, or due notice not given.

The following cases have been recently decided, in relation to this proceeding.

The party who exhibits the deposition on the trial, is competent to prove the absence of the witness from the State. *Harris v. Ely*, Court of Appeals, 30th Dec., 1852; *Nixon v. Palmer*, 10 Barb. 175. The adverse party cannot, however, be examined for the purpose of excluding it. He is interested in the result, and is incompetent on that ground. *Nixon v. Palmer*, above cited.

Although, by the statute, it is provided that the deposition must be filed in the office of the clerk of the county, within ten days from its date, that provision is directory only, and, in cases calling for that indulgence, may be dispensed with. Thus, in *Burdell v. Burdell*, 1 Duer, 625, 11 L. O. 189, where a copy had been filed instead of the original, and the plaintiff, on discovering the mistake, immediately applied for leave to file the original *nunc pro tunc*, the application was granted. It is obvious, however, that this indulgence cannot be calculated upon, except in extreme cases. It is, of course, competent for the parties to waive the filing, by positive stipulation, which course may be convenient, and is not unfrequently pursued.

With reference to the taking of depositions in general, it may be remarked that, under the Code of 1848, those of witnesses residing in the State, but more than one hundred miles from the place of trial, were allowed to be taken, in the same mode as testimony *de bene esse*, and to be so read on the trial, without further proof of the inability of the witness to attend. This provision was positively repealed by the act of 1849, without any saving clause. In a case, where the depositions had been taken, pending the former measure, but the trial did not come on until after the passing of the latter, it was held that such depositions could not be read. *McCotter v. Hooker*, 1 C. R. (N. S.) 213 and 217.

The subject of the perpetuation of testimony, by special proceeding for that purpose, has been already alluded to. The proceedings for that purpose, belong entirely to the former

practice. The proceedings analogous to an examination of this nature, under which witnesses may be compelled to give evidence, on an interlocutory proceeding, have been already alluded to in a previous chapter, under the head of Motions.

### § 181. *Commission to examine Witnesses.*

The testimony of witnesses out of the State may also be procured, as heretofore, by means of a commission for that purpose. The Code contains no provision whatever on this subject, except that a party to the action may be so examined, (sec. 390,) and, therefore, the former practice remains totally unchanged in all its particulars, and the works on that subject may be referred to accordingly.

The plan adopted at the outset forbids, as above noticed, the entering into details, in reference to this most important, and frequently necessary proceeding. The main features of the practice may, however, be stated as follows:

The statute law upon the subject will be found in article II., title III., chap. VII., part. III. of the Revised Statutes, 2 R. S. 393 to 397. The application can only be made after issue joined, and should, of course, be made as soon as practicable after such joinder. If applied for at once, a stay of proceedings until after the return, is obtainable, almost as of course; but, if delayed unduly, such stay may, and probably will be refused. The application may be made by either party, but the proceeding is one very usually taken by consent. See, however, *Morse v. Cloyes*, and *Cope v. Sibley*, below cited, in relation to the possible effect of a consent, if incautiously or too fully given. If so, the consent of the opposite party being obtained in writing, in the usual form, the order of the court is obtained upon it, as of course. Should any peculiar directions as to the return of the commission be desirable, they should be made part of the consent, and be incorporated in the order. If, however, the proceeding be taken adversely, the party, or his attorney, (but more usually the latter,) must make an affidavit, swearing to merits in the usual manner, giving the names and residences of the witnesses required to be examined, and averring that he cannot safely go to trial without their testimony. On this affidavit, an order is obtained for the opposite



party to show cause, on a notice of at least ten days, why a commission should not issue accordingly, the proposed commissioner or commissioners on the applicant's part being named. A copy of such order, and of the affidavit, should be duly served forthwith, and the moving party should also prepare his interrogatories, and serve a copy. On receipt of this document, the adverse party should prepare and serve a copy of his cross interrogatories, and name a commissioner or commissioners on his part. The order to show cause, comes on to be argued in due course, and, if made absolute, a copy of the final order should be served. The interrogatories on both sides, if not agreed upon, are then settled by a judge, or other officer empowered to perform the functions of a judge at chambers, (see introductory chapter,) on appointment for that purpose, of which, notice must, of course, be duly served. If so settled, the interrogatories and cross interrogatories must be signed by the judge or officer so acting. If, on the contrary, they are agreed to by consent, each is signed by both attorneys.

The interrogatories being settled, the commission is drawn up, the usual printed forms being invariably used for that purpose, to which are subjoined or annexed, as specially required by the provisions of the Revised Statutes, full instructions on the subjects of its execution and return; which instructions must be complied with to the letter, or the execution of the commission will be invalid. If any special directions on these subjects be inserted in the order, either by consent, or by direction of the court, the instructions to the commissioners must be carefully corrected accordingly. The signature of the judge, and the seal of the court being then obtained to the commission, to which the interrogatories on both sides must be annexed before it is sealed, such commission and interrogatories must be forwarded, either by post or otherwise, as may be found most convenient, to the commissioners named, who take the depositions of the witnesses in writing, and return it according to the directions. When returned, it remains in the custody of the clerk of the court, who furnishes copies to the parties in the usual manner; or if, by special agreement, it is returned to either of the attorneys, (which proceeding is allowable,) it must not be opened by him unless in the presence of the other, and a copy must be delivered to the latter with all convenient speed. The commission and depositions, when returned in the

latter mode, remain in the custody of the proper party until the trial of the cause, at which the latter are read in evidence in the usual course, all just exceptions as to the admissibility of testimony being then competent to be taken by either party, exactly as if the witnesses, whose depositions are read, were present and personally examined. In the event of any irregularity in the execution of the commission, the opposite party may move at the trial to suppress the deposition *in toto*. Should any portion of them, on the contrary, be objectionable on the ground of improper or non-responsive answers on the part of the witnesses, of inadmissibility of evidence, or otherwise, the motion will be that such portion of the deposition be not read. On all these different matters, the old books of practice should, as before stated, be carefully consulted, the foregoing observations being a mere outline of the subject, and not pretending to be more. The plan laid down at the outset has, however, been slightly departed from, with regard to this peculiar proceeding, by the insertion of the usual forms, which will be found in the Appendix. It seems that a second commission may issue, under certain circumstances, rendering that course necessary. See Graham's Practice, page 596.

The following cases have been decided since the passing of the Code, in reference to the above proceedings:

In *Dodge v. Rose*, 1 C. R. 123, the court held that, on a motion for a commission, the moving papers must show affirmatively that such motion was made in a proper district; and, this not being the case, the application was refused.

In *Bluckmar v. Van Inwager*, 5 How. 367, 1 C. R. (N. S.) 80, this conclusion was denied; and it was held, on the contrary, that there was no rule of practice requiring the moving papers to show the place where the trial was to be had, and that, accordingly, an omission in this respect constituted no irregularity.

The motion in that case was made in a county, adjoining the district, but not the county in which the trial was to be had, and was therefore clearly irregular as a motion, under sec. 401. The opposite party had, however, taken no objection at the time, but had, on the contrary, considered and treated the order as a nullity, and had taken an inquest accordingly, notwithstanding the stay thereby granted. The court held that he had no right to do so, and that the order was not void, but merely

irregular, and, as such, was binding until vacated or set aside; and the inquest was set aside accordingly. If, however, the motion had been opposed, and the fact shown that it was made in a wrong county, the learned judge said he would undoubtedly have declined to hear it.

In *The Bank of Charleston v. Hurlbut*, 1 Sandf. 717, 1 C. R. 96, it was decided that, in analogy with the former practice, the defendant will be allowed twenty days after the service of the reply, in which to apply for a commission, with the usual stay of proceedings.

If applied for with due diligence, the commission issues, and a stay will be granted, as of course; and, if the opposite party serve a notice of trial subsequent to the notice of motion for such purpose, the payment of his costs of the term will not be imposed. If, on the contrary, the notice of motion be not given until after notice of trial is served, the adversary's costs must be offered to be paid at the time, or the whole expenses of preparing for trial will be charged; unless it appear that the papers for the motion have been served without any unnecessary delay, in which case, the moving party will be excused. *Brokaw v. Bridgman*, 6 How. 114; 1 C. R. (N. S.) 407.

The last-mentioned principle was acted upon in *Foster v. Agassiz*, 3 C. R. 150, in which case, costs were not imposed, but were ordered to abide the event. The cause had there been noticed for trial seven days, and the notice of motion given on the thirteenth day after issue joined; it being shown, moreover, on the affidavits, that due diligence had been used in preparing the papers for that purpose.

The above cases refer to an application made within the ordinary period, according to the old practice. It by no means follows, however, that, if delayed until a later period, a commission will not be obtainable. On the contrary, wherever a proper case is shown, it will almost always be granted, though, of course, upon proper terms.

The following principles have been laid down upon this subject by the Superior Court:

"The issuing of a commission is in the discretion of the court. It is usually done as of course, with or without a stay of proceedings, but it is not a matter of strict right. The court must be governed in the exercise of its discretion, by what is apparent will be the consequences; and, if it is evident that great

injustice will be likely to ensue to the adverse party, it is far from being of course to grant it. In such a case, the court will either impose terms, so as to preserve the rights of the adverse party, or will even refuse it, if no way for their protection can be devised." *Ring v. Mott*, 2 Sandf. 683.

Under ordinary circumstances, the stay of proceedings, when granted, is absolute, until the actual return of the commission, however long may be the time necessary for that purpose. In extreme cases, however, the court will interfere. Thus:

Where sufficient time had elapsed, *prima facie*, to have obtained the return of a commission, so issued, with a stay of proceedings, the Superior Court, in *Voss v. Fielden*, 2 Sandf. 690, laid down the rule to be pursued in future, in the following terms: "On considering the matter, we think the rule ought to be, that the parties, in a case like this, have liberty to go to trial at the next term. If the commission be not then returned, it will be incumbent on the other party to apply for a further stay. This will give to the party, desirous to go to trial, an opportunity to answer the statements on which his adversary relies, for continuing the stay of proceedings, and obtaining further time to procure the testimony. Such will be the practice in future, where it appears that sufficient time, *prima facie*, has elapsed for the execution and return of the commission."

The questions as to the due execution and return of a commission of the above nature, will be found very fully entered upon, and the old authorities on the subject cited, in *Fleming v. Hollenback*, 7 Barb. 271, which case should be carefully read, in connection with the works on the former practice, in relation to that subject.

The course of procedure, in relation to the reading of depositions so taken, on the actual trial, is fully considered in *Cope v. Sibley*, 12 Barb. 521, where the rule is laid down, that any points which may arise, as to the admissibility or non-admissibility of questions asked, or evidence taken, rest in the discretion of the judge, as in the case of a witness examined *visà voce*; and the case of *Williams v. Eldridge*, 1 Hill, 249, ruling to the contrary, is disapproved.

In the same case of *Cope v. Sibley*, the interrogatories had been settled by consent, and it was also held, on that ground, that all objections to their form were waived by that mode of proceeding, notwithstanding it had been expressly provided in

the stipulation for that purpose, that it should "have the same effect as the allowance of a judge, reserving all legal rights."

In *Morse v. Cloyes*, 11 Barb. 100, affirmed by the Court of Appeals, 30th December, 1853, where interrogatories had been settled, on a stipulation, which provided that such settlement should be without prejudice to any valid objections to the competency of the witness, to the admissibility of entries in his books, or to the immateriality of the two first cross interrogatories, it was held that, by this form of stipulation, the parties had waived all objections to form, and that neither could make such an objection on the trial. It was also held, generally, that the reservation of all competent objections, by the Revised Statutes, is not applicable to a case, in which the parties have expressly stipulated and agreed upon the objections which are reserved, thus, by implication, waiving every other. The question of the admissibility or non-admissibility of specific items of testimony so taken, is also very fully considered; and the case may be advantageously referred to.

It follows, of necessity, from the view taken in the above cases, that the form of any stipulation to be given on the settlement of interrogatories, is a matter of great delicacy, and requires careful consideration, and that, in cases of importance, it may, perhaps, be more prudent to have the interrogatories settled by a judge, in the usual manner, and not otherwise.

The issuing of a commission rests in the discretion of the court. Where, therefore, the object proposed was to obtain cumulative testimony, on a point as to which there was conflicting evidence, and the cost of executing the commission would exceed the amount involved in the specific point to which the evidence was directed, the application was refused. *Mitchell v. Montgomery*, 3 Sandf. 676.

In moving for a commission, it is sufficient, if the materiality of the testimony sought to be obtained is positively sworn to. The applicant is not bound to state what he expects to prove by the witness, whose testimony he seeks to procure. *Eaton v. North*, 7 Barb. 631, 3 C. R. 234; and see *The People v. Vermilyea*, 7 How. 369, there cited.

A party to the action, residing out of the State, may be examined on commission, at the instance of the adverse party, in the same manner. *Brockway v. Stanton*, 2 Sandf. 640; 1 C. R. 128.

If a commission be defectively executed, in matters of mere form, the court possesses, and will exercise the power of ordering it to be returned to the commissioners, to have the defect amended, without its being necessary to issue a second commission, and examine the witnesses again.

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## CHAPTER V.

### OF THE FORMAL PREPARATIONS FOR TRIAL.

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THE above precautionary or accelerative proceedings, with a view to the ultimate trial of the issue, when joined, having thus been considered; the ordinary measures for placing the cause on the calendar, and bringing on the trial, in due course, form the next subject for consideration.

#### § 182. *Noticing and setting down Cause.*

*Statutory Provisions.*—The provisions of the Code, on the subject of the notice of trial and note of issue, are contained in sections 256 and 258, and run as follows:

§ 256. At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice, shall furnish the clerk, at least four days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

§ 258. Either party giving the notice, may bring the issue to trial, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial, between a plaintiff, and any of the several defendants, may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

*Notice of Trial.*—Although peculiarly incumbent upon the

plaintiff, on whom rests the conduct of the cause, the above proceedings will, in almost every case, be equally necessary on the part of the defendant. It is true, that a notice on the part of the plaintiff will be sufficient to bring on the cause in regular course, and that, if so brought on, the defendant will labor under no actual disability in respect to his defence; still, on the other hand, the latter, if he omit to give a counter-notice, and to put the cause regularly upon the calendar on his own behalf, will be without remedy, in case of the plaintiff's change of intention, or neglect to appear when called. He will stand, in fact, in the disadvantageous position of being bound by his adversary's notice, without the power of taking any affirmative measure on his own behalf. The plaintiff has, too, under these circumstances, a positive power to stipulate under Rule 20, from which a notice on the part of the defendant will preclude him, by the terms of that rule. In no case, therefore, should this precaution be omitted on the part of the latter. When, however, the defendant has given such a notice, he must move the cause in its order when called on. If he omit to do so, he cannot afterwards move for a dismissal, under Rule 21. *McCarthy v. Hancock*, 6 How. 28; 1 C. R. (N. S.) 188.

He will equally be precluded in that respect, if he consent to any postponement, the effect of which may be to throw the cause over the circuit, though not intended at the time. *Fuller v. Sweet*, 9 How. 74.

The omission to give such a notice will not, however, deprive the defendant of his right to make an independent motion for a dismissal of the complaint, on the ground of its not having been set down by the plaintiff. He will be entitled to do so, on showing, by affidavit, that the cause was at issue in time to have been noticed, and that, at the term for which it ought to have been noticed, younger issues have been tried. He cannot, however, obtain any affirmative relief, on a motion of this description, or otherwise than by bringing the cause on, on notice by either side. All he can obtain is, a simple dismissal of the complaint. *Ray v. Thompson*, 1 Duer, 636, 8 How. 283; see also heretofore, under the head of Motion to dismiss for want of Prosecution, and cases there cited.

Where the plaintiff only has noticed the cause, and omits to bring it on, the defendant, if he attends prepared, is entitled to the costs of the circuit. He must, however, apply for them on

the first opportunity afterwards, or his right to enforce their payment will be gone. The plaintiff, on the other hand, will not be entitled to recover his, under such circumstances, though he ultimately obtain a verdict in the action. *Whipple v. Williams*, 4 How. 28.

The usual forms of notice of trial of an issue of fact, or of argument of an issue of law or appeal, before the general or special terms, which all are subject to the same general conditions as to time, service, and otherwise, will be found in the Appendix. In the Court of Appeals, a different period is prescribed, as see hereafter.

Where notice of trial of an issue of fact is given by the plaintiff, and no affidavit of merits has been served on the part of the defendant, (as to which, see subsequent portion of the chapter,) it is necessary that the intention to take an inquest should be expressed upon the face of that notice. If omitted, it cannot be taken. See Rule 12 of Supreme Court. Where such affidavit has been served, or where the notice is on the part of the defendant, the correct practitioner will strike these words out of the ordinary form, though the omission to do this will not vitiate the notice, and usually happens.

If the plaintiff notice the cause for trial, and put it on the calendar in the ordinary form, he is bound to bring it on for trial when it is reached, or he will be liable to a motion for dismissal on the ground of want of due prosecution. *Bishop v. Morgan*, 1 C. R. (N. S.) 340.

The provisions of the Code on this subject extend to the case of a trial by referees, on which, it is competent for both parties to give notice in the ordinary form, and for the defendant to proceed upon his notice, by default, and take a report in his favor, in the event of the plaintiff's omission to proceed; and such will be his proper course. *Williams v. Sage*, 1 C. R. (N. S.) 358; *Thompson v. Krider*, 8 How. 248. See also hereafter under the head of Trial by Referees.

It is, of course, incumbent upon the plaintiff to serve notice upon every defendant, as, otherwise, he cannot bring on the cause, as against those with respect to whom he has omitted to do so. Under ordinary circumstances, it will not be necessary for a defendant to serve co-defendants. Where, however, in his answer, he seeks relief as against them, it might be prudent. Section 253 gives him power to take "a dismissal of the complaint,



or a verdict or judgment, as the case may require;" and, of course, he cannot obtain affirmative relief, as against any party who has not been duly cited to appear. Cases of this description are, however, not likely to be frequent; and it may be well doubted whether, even after notice so given, he could, in the event of a general default, do more than take a dismissal of the complaint as against the plaintiff. If the cause come on in due course, and all parties are heard, there is no question but that the court then possesses the power of passing upon the mutual claims of all parties; but the defendant's power to obtain affirmative relief, by default, as against parties other than the plaintiff, seems questionable. There is no reported case upon the point, but the more consistent view seems to be, that, on the plaintiff's default, the whole case falls to the ground, and is out of court; and that, if wished for, affirmative relief, as against other parties, can only be obtained by a party in that position, in the ordinary mode, by means of an affirmative proceeding. Allegations of equities between co-defendants, when standing alone, form no defence, as against the plaintiff's right to recover. See *Woodworth v. Bellows*, 4 How. 24; 1 C. R. 129; and the converse of this proposition, *i. e.*, that, if the plaintiff abandon his case, the whole proceeding becomes inoperative, and a dismissal of the complaint the only proper course, would seem to be equally sound. The experiment appears, however, to be open for trial, if thought expedient.

With reference to the time prescribed by section 256, in *Easton v. Chamberlin*, 3 How. 412, it was held, that the language of this section is governed by that of section 407, and, therefore, that the day of service of a notice of trial is excluded from, and the first day of term included in the computation of the ten days required under the former. The same point was decided, and a notice served on the 11th for the 21st held good, in *Dayton v. McIntyre*, 5 How. 117; 3 C. R. 164. Where service by mail is admissible, the above time is, of course, double, and a twenty days' notice, instead of ten, must be given. See *Dorlon v. Lewis*, 7 How. 132.

The notice should be for the first day of the term or circuit, on the calendar for which the cause is placed. In the Court of Common Pleas this is the subject of a special order, No. 5 of orders of 1848, but in all the others it is equally necessary.

By giving notice of trial, the party admits that the pleadings

are sufficient to raise an issue, and cannot afterwards move, under sec. 160, to strike out redundant matter. *Esmond v. Van Benschoten*, 5 How. 44. The plaintiff may give notice of trial, &c., immediately on the service of the reply, though, of course, at his peril, if the defendant subsequently amend under section 172. The cause is then properly at issue, notwithstanding the defendant's right to do so. The former is not, however, obliged to bring the cause on, until the expiration of a reasonable time after the time to amend has elapsed, unless the defendant waive his right to amend, by giving notice of trial, or that he shall not avail himself of that right. If the defendant so waive his right, the plaintiff is then, apparently, bound to go on; *Cusson v. Whalon*, 5 How. 302, 1 C. R. (N. S.) 27; and it would seem that ten days after the time to amend has expired, is a reasonable time to prepare for trial. In cases where service by mail is allowable, the defendant has forty days to amend, and the plaintiff will not be in default, till after that time has elapsed. The provisions of sec. 172, allowing twenty days for that purpose, do not limit the period absolutely, without reference to sect. 412. *Same case*.

Although, if either party amend in good faith, his right to do so is absolute, an amendment is inadmissible, if clearly made for purposes of delay. In *Allen v. Compton*, 8 How. 251, an amended answer, so served, the effect of which was to throw the cause over the circuit, was held to be a nullity, and the plaintiff's motion to strike it out was granted.

An offer, too, cannot be served so late as to have that effect, as regards the plaintiff's proceedings. Where such is the case, and the cause is reached, within the ten days allowed the plaintiff to elect, the latter will be entitled to proceed, as if none had been made. *Pomroy v. Hulin*, 7 How. 161.

An offer of that nature will, however, preclude the defendant from taking any steps on his own behalf, within that period. The plaintiff is entitled to the full period, allowed him to make his election in writing, nor will a parol declaration on his part avail to deprive him of that right. *Walker v. Johnson*, 8 How. 240.

An appeal from an order, striking out a portion of the defendant's answer, effects a complete stay of proceedings, until it is decided, and the plaintiff cannot proceed to try the cause on the remaining issues, pending that appeal. *The Trustees of Penn Yan v. Forbes*, 8 How. 285.

The notice of trial is, in a great measure, the same as that under the old practice, and is generally subject to the same incidents. If insufficient, of course, no proceeding grounded on it will be valid. If one party only have given a notice, he may countermand it, but, if the opposite party have already incurred costs in consequence, he must pay them. The party entitled to receive those costs should, however, apply for them the first opportunity, or his right may be lost. See *Whipple v. Williams*, before cited.

The notice of trial must be served upon the opposite attorneys, in the usual manner, (see chapter as to interlocutory and formal proceedings,) and the party doing so, must be prepared with proof of that service, in the event of the cause being called on, as, otherwise, he cannot take any step grounded thereon. The ordinary course, is to obtain the signature of the opposite attorney, to an admission endorsed on the notice itself. Where this is impracticable, the usual affidavit of service should be made, and may be endorsed on that notice, or annexed to it, as may be most convenient. If the service be by mail, an affidavit of the posting, and payment of the postage, will be the proper form.

*Note of Issue.*—The form of the note of issue is so clearly prescribed by sec. 256, that it would be unnecessary to give one in the Appendix. Four days prior to the commencement of the term is now the legal period in all cases, and with reference to every description of issue. See Rule 34. Prior to the last revision, the Rules presented an anomaly, in requiring notes of issue for the general term, to be filed eight and not four days previous, but that anomaly is now corrected.

The following special provisions have been made by the New York local tribunals in this respect. In the Common Pleas it is provided, by Rule 7 of June, 1848, that, where the parties have agreed in writing to waive a trial by jury, such consent ought to be stated on the note of issue, and the consent filed with it. In the Superior Court a distinction is made between the special and trial terms. See Rules 3 and 4 of that court of 18th January, 1851. Temporary rules have from time to time been made by the latter tribunal, to the effect that, whenever a cause has been already on the calendar, the note of issue must state that fact, and its number on the last previous calendar, or it will be dis-

regarded, and the cause lose its place. Of late, however, this rule has been abandoned.

Another practice has sprung up in the New York courts, *i. e.*, that of requiring notes of issue for the circuit or trial terms, to be filed at an earlier period than that prescribed by the Code, and, generally, nine days before the commencement of the term. This practice is no doubt highly convenient, if not necessary, in view of the crowded state of the calendar in that district, and it is accordingly generally and cheerfully assented to. Its legality, however, seems questionable, in view of the positive provisions both of the Code, and of the Rules, upon the subject. It, in effect, repeals those provisions, *pro tanto*; and whether any judge or any court can do so as a matter of right, seems more than doubtful.

The nature of the issue, whether of law or fact, should be stated on the face of the note, and a notice, in the former case, as to whether it arises on appeal or demurrer, would be a convenient addition. It should also be stated whether it is filed by the plaintiff or the defendant, though this is not an absolute essential. (In the Court of Appeals a different practice prevails, as will be noticed hereafter.) When it is forwarded to the clerk of the court by post, it must be sent in sufficient time, so that he may receive it on or before the last day appointed. If not, the cause will not, of course, be on the calendar.

It seems prudent, as a general practice, to file a cross note of issue on the part of the defendant, although, if the plaintiff place the cause on the calendar, the precaution will be superfluous, at least so far as bringing it on in its order is concerned. In *Browning v. Page*, 7 How. 487, a dismissal taken by defendants, where the cause, though noticed, had not been regularly placed on the calendar, was held to be irregular, and set aside.

The proper date of an issue of law or fact, is that of the service of the last pleading, demurrer, answer, or reply, as the case may be; or, where such pleading has been amended, then, of the amended pleading. Where two independent issues, one of law, and the other of fact, are raised in the same case, the date of the former will be that of the service of the demurrer; of the latter, that of the answer or reply, according to circumstances. Before the last revision of the Rules, the practice, as to the date of issues for the general term, was, in some respects, uncertain.

See *Gould v. Chapin*, 5 How. 358; 9 L. O. 187; 1 C. R. (N. S.) 74. By Rule 34, as it now stands, they are definitively fixed, as under:

The clerk shall prepare a calendar for the general term, and cause the same to be printed for each of the judges holding the court. Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and other cases, as of the time when the question to be reviewed arose.

The necessity of the above proceedings being taken in due time, and the expediency of their not being put off till the last moment, is evidenced by the case of *Wilkin v. Pearce*, 4 How. 26. In that case, the sudden and violent illness of an attorney, who had waited until the last moment to take these steps, was decided to be an insufficient excuse for the omission, and the cause was refused to be placed upon the calendar. The decision is one of the Court of Appeals, the rules of which are, as before stated, somewhat different, but the principles are of general application.

According to the Code, and the general spirit of the Rules, the filing of the note of issue ought, perhaps, to be repeated every term that the cause is on the calendar, until it is finally disposed of. In the Supreme Court, however, in the First District, and in the New York Common Pleas, this is dispensed with, and, the note of issue once filed, the cause takes its place on the general calendar, and there remains, until heard in due course, without any necessity for a repetition of the proceeding. This very convenient arrangement has been partially adopted by the Superior Court, which issues special rules, from time to time, for the consolidation of a certain number of terms, generally three at one time. A cause, once placed on the calendar, remains there, without further proceeding, until called. Once called and passed, however, a fresh note of issue will be requisite for the succeeding term, and the cause will lose its original precedence. In all the other courts throughout the State, in which no special provision is made on the subject, the note of issue must be repeated every term, until the cause is regularly called on.

Although the repetition of the note of issue is, in most cases, dispensed with, as above, a fresh notice of trial must, on the contrary, be given every term, in which the cause is on the

calendar, unless such notice be dispensed with by special order, as is now habitually done by the Superior Court, in the instances above alluded to. This course, however, has not been adopted by the other tribunals, and, as a general rule, the cause must be re-noticed every term; and, wherever there is the slightest doubt upon the subject, it would not be wise to omit the precaution. The parties are compensated for this extra trouble, by the term fee allowed under subdivision 8 of sec. 307. The terms held by the different courts, will be found in their rules for the time being, and in the appointment of circuits, &c., of the Supreme Court, as published every two years, by authority. (See list subjoined at the end of the volume.)

All issues, whether of law or of fact, must now be noticed for the special or trial terms, or circuit, in the first instance. See Code, s. 255. Under the amendments of 1851, the case was different; and an issue of law was originally cognizable by the general term, and not by the single judge, unless the court should otherwise direct. This, however, as a general rule, was done. See rule of the Superior Court on this subject, reported, 4 Sandf. 725. This anomaly is now remedied, and, by the last amendment, all original issues are placed upon the same footing, the general term taking exclusive cognizance of appellate proceedings, and of them alone.

### § 183. *Affidavit of Merits.*

The next proceeding to be noticed is one exclusively applicable to the defendant, *i. e.*, the filing and service of the usual affidavit of merits, in order to prevent the plaintiff from taking an inquest. This is, in a great measure, a proceeding under the old practice. It was specially provided for by No. 92, and is also referred to in Nos. 86 and 31 of the Supreme Court Common Law Rules of 1847. By Rule 36 of those now in operation, it is prescribed that, "in addition to what has usually been inserted," (see Rule 92, of 1847, above referred to,) "the party shall swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel." The usual form will be found in the Appendix, and should be complied with to the letter; the courts being extremely strict upon the subject. Should further information be required, the old books of practice may be referred to.

The original affidavit of merits must be filed with the clerk of the court in which the action is pending, on the first day of the term for which such action has been noticed, at the very latest; and a copy of it, with a notice of the filing of the original endorsed, must be also served upon the plaintiff's attorney, so as to be received by him before the inquest is actually taken. If either be omitted, the latter will be in a situation to take an inquest, at the opening of the court on the succeeding morning, or on any day after such first day, provided his notice of trial has been framed accordingly. See Rule 12 of present Rules. It would, however, be improvident to wait till so late a period as that above mentioned, before taking this necessary measure. The more usual and advisable course is to make and serve such affidavit at an early period after issue has been joined.

Where practicable, such affidavit should always be made by the party himself; but, if he be unable to do so, his attorney or counsel may make it, a sufficient excuse being shown on its face. See Rule 92 of 1847, before referred to. The affidavit must be unqualified, as to the existence of a defence on the merits, and the advice on the case sworn to must be the advice of counsel, and not merely of an attorney, or it will be insufficient. Once made, filed, and served, such affidavit is available to prevent an inquest at any future time, until the cause has been finally disposed of. It should be made and filed separately, and not incorporated with other proceedings in the case. The affidavit of one of several defendants, having a joint defence, would seem to be sufficient to prevent an inquest, as against all; otherwise, however, if the defences be several.

By Rule 92 of 1847, before referred to, an affidavit of merits is made necessary, in actions "upon any written instrument or record, which shall be described in, or a copy of which shall be served with the declaration;" and the form of the affidavit was there prescribed to be as follows—*i. e.*, that the party making it had stated the case to his counsel, and that he had a "good and substantial defence upon the merits, to the plaintiff's demand, on the bill of exchange, promissory note, or other written instrument, or the judgment, recognizance, or other record, on which the action is brought, as he is advised by his said counsel, and verily believes to be true." It may, therefore, be fairly argued, that, in those cases in which the action is not founded upon a written instrument or record, such affidavit is not neces-

sary at all, and an inquest cannot be taken. Where, however, there exists any, even the slightest doubt upon the subject, so obvious, and, at the same time, so easy a precaution should never be omitted.

Although provided for by the recent rules, the Code is silent upon the subject of the affidavit of merits, or of the inquest to be taken where none has been served. It was at first contended that a verified answer, under the Code, was sufficient to prevent an inquest; but it was speedily settled that such was not the case, and that the former practice upon the subject remained unaltered. See *Anderson v. Hough*, 1 Sandf. 721; 6 L. O. 365; 1 C. R. 50; *Sheldon v. Martin*, 1 C. R. 81; *Jones v. Russell*, 3 How. 324; 1 C. R. 113; *Dickinson v. Kimball*, 1 C. R. 83; *Hunt v. Mails*, 1 C. R. 118.

The strictest compliance with the letter of the rules above cited, is enforced in all the decided cases. Thus, in *Rickards v. Swetzer*, 3 How. 413, 1 C. R. 117, an affidavit that the defendant had stated to counsel the facts "of his defence," instead of "the case," or "the facts of the case," was held to be defective. "It may be," the learned judge goes on to say, "that there was a complete and perfect answer to his defence, of which counsel was not aware."

An affidavit by the defendant, of "a defence in the action," and asserting that the answers were put in in good faith, and not for delay, has, likewise, been held to be insufficient. The defendant had not sworn to the advice of counsel, nor to a defence on the merits. *McMurray v. Gifford*, 5 How. 14.

An affidavit that the party had stated to counsel "the facts of this case," though not in strict verbal compliance with Rule 39—which requires a statement of "the case"—was sustained in *Jordan v. Garrison*, 6 How. 6, 1 C. R. (N. S.) 400, in accordance with the reference in *Rickards v. Swetzer*, above cited, to those two expressions, as importing the same thing. Had the statement been of the facts of "his" case, it would, doubtless, have been held bad.

An affidavit, that the defendant had stated "his case in the cause," was decided to be insufficient, as importing merely a statement of his defence, in *Ellis v. Jones*, 6 How. 296.

In common law actions, the affidavit of merits need not, in ordinary cases, be special, as was required in chancery under the old practice. Where, however, the defence is attended with



suspicious circumstances, the court may require the facts to be stated. *Dix v. Palmer*, 5 How. 233; 3 C. R. 214; *Van Horne v. Montgomery*, 5 How. 238. In the reports of these cases, it is said that several decisions had been cited, which held that the affidavit of merits, under the Code, should be special. None, however, appear upon the reports, and it seems difficult to conjecture on what ground this could have been held.

In cases where a demurrer is put in, an affidavit of merits may possibly be necessary. See *Appleby v. Elkins*, 2 Sandf. 673, 2 C. R. 80, where leave to answer was refused, on judgment being given on a frivolous demurrer, on the ground that there was no affidavit of merits.

Where the only defence put in by the defendant consists of a partial set-off, and the plaintiff omits to reply to that defence, an affidavit of merits will be superfluous. The plaintiff, under these circumstances, must allow that set-off, in the inquest to be taken by him; and, if he omit to do so, that inquest will be set aside. *Potter v. Smith*, 9 How. 262.

### § 184. *Preparations for Trial.*

*General Remarks.*—The cause having thus been regularly put on the calendar, and noticed by either or both of the parties, and the necessary measures, in order to prevent an inquest, having been taken on behalf of the defendants, it remains to notice, shortly, the preparations for the trial itself.

*Enforcing attendance of Witnesses, ordinary Subpœna.*—On an issue of law, or an appeal, no witnesses, of course, are necessary. The proceedings for enforcing the attendance of those required upon the trial of an issue of fact, are identically the same as under the old practice; and, therefore, under the general plan of the work, they will not be here entered upon in detail. The statute law on the subject of witnesses, their privileges, compelling their attendance, &c., will be found in art. VI., title III., chap. VII., part III. of the Revised Statutes, 2 R. S. 400 to 403; and the power of courts of record to issue subpœnas, at 2 R. S. 276. The punishment for refusal or neglect to obey such subpœna, by process of contempt, is prescribed in title XIII. of chap. VIII., part III. of the same

statutes, 2 R. S. 534 to 541; the witness being also punishable by fine and imprisonment, under the article first referred to. The proceedings for obtaining the testimony of a party in prison, by means of a *habeas corpus ad testificandum*, will be found in the first five sections of art. I., title I., chap. IX. of part III., 2 R. S. 559.

The mode of service of subpoena, is, by delivering a copy of it, or a ticket containing its substance, to the witness, showing him at the same time the original writ, under the seal of the court issuing the same. Both subpoena and ticket are ordinary forms, to be procured at any legal stationer's. The fees allowed by law to such witness, for travelling to and returning from the place where he is required to attend, and the fees allowed for one day's attendance, must be paid, or tendered to such witness at the time of service, or his attendance cannot be enforced. See 2 R. S. 401, sec. 52. Those fees will be found at 2 R. S. 643, sec. 49. They consist of travelling fees, at the rate of four cents per mile, going and returning, if the witness resides more than three miles from the place of attendance. Within that distance, he is only allowed the fee for his attendance, which is fifty cents for each day during which he is engaged. One day's fee must, as before observed, be paid to him, at the time of the service of the subpoena. For further particulars, if required, see the books on the former practice. Under the Code, the evidence of the adverse party is obtainable, in the same way as that of an ordinary witness, and may be compelled in the same manner—sec. 390. He must be served with a subpoena, and his expenses tendered or paid, precisely as if he were an ordinary witness.

The subpoena, when issued, must be legally served. If force be used in an attempt to serve one, the party using it will be responsible, and will not be in any wise protected, by the process being in his hands. *Huger v. Danforth*, 8 How. 435.

### *Documentary Evidence.*

*Subpoena duces Tecum.*]—In cases where documents are in the hands of any person, and are required to be produced on the trial, the usual form of subpoena *duces tecum* should be used, and the documents required to be produced, should be distinctly and

clearly stated on its face, so as to avoid the possibility of any mistake occurring. Forms are similarly obtainable, and this process must be served in the same way as the ordinary subpoena. A party compelling the production of books upon the trial, must remember that, by so doing, he makes them evidence for both sides. See *Low v. Payne*, 4 Comst. 247.

If a witness served with this form of subpoena, neglect to produce the documents required, he is liable for all damages sustained by that neglect, nor will his mere appearance to give evidence protect him. And, in an action for that purpose, the plaintiff will not be required to prove that he had a good cause of action. The mere fact that he was nonsuited for want of the production of the papers, will be sufficient. *Lane v. Cole*, 12 Barb. 680. See likewise *Bonesteel v. Lynde*, below cited.

In *Trotter v. Latson*, 7 How. 261, it was considered that a party to the action, when examined, was not compellable to produce his books and papers, under a subpoena *duces tecum*, but that an application, in the nature of a motion for discovery, was the proper course to pursue. In *Bonesteel v. Lynde*, however, 8 How. 226—affirmed on appeal, 8 How. 352—this proposition is combated with great force, and with full detail, and the contrary conclusion is come to; and this view is supported by *Stalker v. Gaunt*, 12 L. O. 124, in which it is stated, that such is thereafter to be regarded as the settled practice of the Superior Court; and there seems no doubt but that, in the other tribunals also, the decisions last cited will henceforth be the controlling authority. See likewise *Higgins v. Bishop*, 12 L. O. 127; *Stalker v. Gaunt*, 12 L. O. 132, and *Jarvis v. Clerk*, 12 L. O. 129; in which last case, and also indirectly in *Stalker v. Gaunt*, it is maintained that the obligations of the party in this respect, extend equally to those cases where he is examined under sec. 390 of the Code, as where that examination takes place on the actual trial. A party is therefore liable, and compellable under a subpoena of this description, precisely as a stranger witness, and is similarly punishable, if he disobey the direction for that purpose. His rights to object to the inspection or the reading of those papers as evidence, when actually produced, remain, however, intact, and are in no wise prejudiced by his obedience to the subpoena. *Bonesteel v. Lynde*, and *Stalker v. Gaunt*, above cited.

*Notice to produce.*—If the documents so required are in the

sole hands, or under the sole control of the adverse party, and evidence of their import only be requisite, the former practice may be pursued, by giving a notice to produce them, or that secondary evidence will be given of their contents. See form in Appendix. That notice must be specific in its terms, and must distinctly point out what is required. See *Stalker v. Gaunt*, above cited.

*Exclusion of adverse Evidence.*—This proceeding is admissible under special provisions of the Code: 1. With reference to evidence of an account, the particulars of which have been required under s. 158, but have not been, or have been insufficiently, furnished; and, 2. With reference to a paper ordered, but refused to be produced, under s. 388. With regard to the latter, it is expressly provided, that such exclusion is to be made by the court, on motion. The mode of application, under the former state of circumstances, is left without special provision. In *Kellogg v. Paine*, 8 How. 329, the question came before the court; and, although it was considered that the motion might possibly be made at the trial, it was held to be the better practice, to apply previously for an order to that effect. It is clear that, under these circumstances, the obtaining of such an order is proper, and will be most advisable, at the present stage of the action. It should, of course, be made on the usual notice, the facts being shown by affidavit.

*Papers, &c., to be used on Trial.*—The last point to be noticed is the preparation and furnishing of the papers necessary for the information of the court. This is provided for by section 259 of the Code, which runs as follows :

§ 259. When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings, and the offer of the defendant, the same may be furnished by the defendant.

See as to the correctness of such copies, *Wilcox v. Bennett*, 10 L. O. 30. Where the defendant anticipates that the plaintiff may fail to attend, he should, of course, be prepared as above. If, on the contrary, an inquest or judgment by default be antici-

pated, a calculation of the amount for which the verdict or judgment will have to be taken, should be prepared beforehand, so as to be ready to be sworn to, on the cause coming on. In cases of *remittitur* with "*venire de novo*," where an opinion has been pronounced by the court above, a copy of that opinion will probably be required by the judge who presides at the second trial, and should be prepared accordingly.

As a general rule, where any papers are likely to be required in the course of the trial, care must be taken that they are in court, and, where practicable, copies of them should be prepared, ready to hand in to the court, when asked for. Of course, the moving party's attorney will take care, that any documentary evidence, in the custody of the clerk or other officers of the court, such as depositions taken on commission, former records, or other documents of a like nature, are ready in court, when called for, and previous notice to that effect should be given to such officers accordingly.

*Postponement of Trial.*—In case a postponement of the trial be wished for on the part of the plaintiff, the court will grant an order for that purpose in any proper case, upon sufficient cause shown, on payment of costs to the defendant, and on giving a stipulation to bring the cause on at the next circuit or term, (see Rule 21,) or, perhaps, without imposing those terms, if the case be one of evident necessity, and involving no hardship on the defendant. With the latter view, it will be expedient not to delay the motion till the last moment, when expenses may have been actually incurred, and, when necessary to be made, it must of course be so upon the usual notice. In the ordinary routine of practice, however, the necessity of an application for this purpose may generally be saved, by means of a consent on the part of the opposite party, which will rarely be refused, when the cause is conducted in a fitting spirit on both sides, and the request is really reasonable.

*Remarks preliminary to succeeding Chapters.*—Before entering on the consideration of the actual trial of the cause, the subject of the discovery of deeds or documents, the examination of parties, and of the changes effected by the Code in the law of evidence, will be considered in the three succeeding chapters.

The two former are, in strictness, special proceedings, but

they are nevertheless so peculiarly appropriate to this stage of the cause, that the present is evidently the most fitting period for their consideration; and the latter, though especially incident to the actual trial, will be more conveniently treated of in a separate form, and dissociated from the formal machinery at the hearing.

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## CHAPTER VI.

### INSPECTION AND DISCOVERY OF DOCUMENTS.

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#### § 185. *General Remarks, Statutory Provisions.*

THIS proceeding is provided for by the latter portion of § 388. The former part of that section relates to the enforcement of the admission of documentary evidence, and has been treated of in a preceding chapter.

The statutory provision runs as follows:

The court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any books, papers, and documents in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

This proceeding is, in its substantial elements, the same as that of the bill for discovery, under the former chancery system. It is also expressly provided for, by the Revised Statutes, title III., chap. I. of part III., sections 21 to 27 inclusive; 2 R. S. 199, 200. By these sections, the Supreme Court are empowered to compel such discovery, in any proceeding therein, the practice to be prescribed by rule; but, in the meantime, to be governed by that of the Court of Chancery. The application is expressly prescribed to be made by petition, verified on oath, upon which, an order for the discovery, or to show cause why

it should not be made, may be granted by the court, or by a judge. Provisions are then made for vacating such order, on proof of compliance, or of impossibility to comply with it, or that it ought not to have been granted; but all proceedings of the party against whom it is granted, are, in the meantime, to be stayed. The penalty, in case of refusal or neglect, is next prescribed, as a non-suit on the one hand, or the striking out the defendant's pleading, or restricting him in his defence, on the other, but such penalty is not to extend to any further proceedings against the person or property of the party in default; and it is lastly prescribed, that any documents produced under any such order, should have the same effect, as evidence, as if produced on notice, according to the practice of the court.

Rules were made by the Supreme Court in pursuance of these provisions, by which the former practice was governed. See works on that practice. But those rules are, of course, now superseded by those of August, 1849.

The present Rules in relation to this practice, are Nos. 8 to 11 inclusive, and run as follows:

**RULE 8.** Applications may be made, in the manner provided by law, to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this court, or of any defence in such action, in the following cases:

1. By the plaintiff, to compel the discovery of books, papers, or documents, in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers, or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

**RULE 9.** The petition for such discovery shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers, and documents, whereof discovery is sought, are not in the possession, nor under the control of the party applying therefor, and that the party making such affidavit is advised by his counsel, and verily believes, that the discovery of the books, papers, or documents mentioned in such petition, is necessary, to enable him to draw his complaint, answer, demurrer, or reply, or to prepare for trial, as the case may be.

**RULE 10.** The order granting the discovery shall specify the mode in which the same is to be made, which may be, either by requiring the party to deliver sworn copies of the matters to be discovered, or by re-

quiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in the order. The order shall also specify the time, within which the discovery is to be made. And, when the papers are required to be deposited, the order shall specify the time that the deposit shall continue.

RULE 11. The order, directing the discovery of books, papers, or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply, or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect, by declaring how far it shall operate as a stay of proceedings.

It will be observed that these Rules only provide, in terms, for the case of a discovery sought with a view to the due framing of the pleadings in the cause, and are silent as to the many other occasions, on which such a discovery may become necessary, during the progress of a contested suit. On the other hand, the Code and Rules, taken together, clearly extend the powers of courts of justice, in relation to discovery, to all the tribunals of superior jurisdiction, except the Court of Appeals, without exception or qualification; and Rules 10 and 11 may be considered as in part, at least, if not generally applicable to all cases, in which a discovery is proper, under either the old or the new system.

The remedies above cited are concurrent; and the party applying for relief of this nature, may shape his application, either under the provisions of the Revised Statutes, or those of the Code, at his option. *Follett v. Weed*, 3 How. 303, 1 C. R. 65; *Stanton v. The Delaware Mutual Insurance Company*, 2 Sandf. 662; *Moore v. Pentz*, Id. 664. "There is no incongruity between the two systems, and they may well stand together." This was held to be the case, both generally, and specially, under sec. 469, which retains the former Rules and practice, where consistent with the Code. See, likewise, *Gelston v. Marshall*, 6 How. 398; *Brevoort v. Warner*, 8 How. 321; *Lovell v. Clarke*, 7 How. 158; and *Hoyt v. American Exchange Bank*, 1 Duer, 652, 8 How. 89.

It is clear that the prohibition of actions to obtain discovery under oath, effected by sec. 389, does not apply to proceedings of this nature, but only to the ordinary bill of discovery for the



examination of a defendant, under the old chancery practice. See *Follett v. Weed*, 3 How. 303, 1 C. R. 65, above cited.

When the books of an adversary are relied on, the party who does so, must take them as evidence of charges against him. His own books cannot, on the contrary, be used by him in his own favor. *Low v. Payne*, 4 Comst. 247.

### § 186. *Discovery under Rules.*

The two systems are, in fact, to a certain degree, not merely concurrent, but distinguishable, and the distinction seems to be this: *i. e.*, that, where the discovery sought is for the purpose of assisting in the preparation of, or with a view to answer, any pleading in the cause, the case falls more peculiarly under the provisions of the Revised Statutes, and of the Rules; where, on the contrary, the application is made after issue, and with a view to prepare for trial, the Code more exclusively governs.

This distinction is more especially drawn in *Gelston v. Marshall*, 6 How. 398, which holds that, where the application is with a view to enable the defendant to answer, section 388 is not applicable, and the application comes under the Revised Statutes and the Rules, and especially Rule 9, which provides that the applicant shall state the facts and circumstances under which the discovery is claimed, according to the old chancery practice. The papers there sought to be discovered, being apparently matters of evidence merely, and not absolutely necessary, with a view to prepare the pleading, in the first instance, the application was accordingly denied. See, likewise, *Stanton v. The Delaware Mutual Insurance Company*, before noticed, and *Higgins v. Bishop*, 12 L. O. 127, where an application was denied, because framed under the provisions of the Code, and not under those of the Revised Statutes.

The same distinction is also drawn in *Keeler v. Dusenbury*, 1 Duer, 660; 11 L. O. 287, where an order for a discovery was altogether refused, in a proceeding, not with a view to relief, but in order to perpetuate testimony. It is also laid down that, where the discovery is sought with a view to enable a plaintiff to frame his complaint, the discretionary powers of the court will not be exercised, without strong affidavits, showing its necessity to enable the plaintiff to obtain redress. Discovery,

under the Code, should not properly be made before issue joined; there can be no merits of the case till then. See, however, *Miller v. Mather*, 5 How. 160, 2 C. R. 101, below cited.

In *Hoyt v. The American Exchange Bank*, 1 Duer, 652; 8 How. 89, the subject of discovery, in relation to specific entries in the books of an adverse party, is treated at great length, and the views of the Superior Court on the subject, are generally and distinctly stated. The concurrence of the two systems is unequivocally laid down, and the distinction between applications, under the Revised Statutes on the one hand, and under the Code on the other, is acknowledged. With regard to the former, it is held that, if a party applies under the Revised Statutes, and makes out a case, as provided for by the Rules, he has a right to a discovery. The court will, however, exercise its discretion, as to the manner in which that discovery should be made. In ordinary cases, and unless indispensable to protect the rights of the party applying, the court will not order an inspection to be given, or a deposit to be made, but sworn copies of books or entries, or of papers and documents, to the discovery of which the applicant shows a right, will be ordered to be furnished. The application, in these cases, must conform exactly to the provisions of Rule 9, and the particulars, of which a discovery is sought, must be set forth, according to the old chancery practice. The opposite party cannot be subjected to a fishing examination, whether he has or has not material evidence in his possession, by way of mere discovery, or unless by his examination as a witness, so that his deposition may be made evidence for, as well as against him; and if, in answer to the order, he denies, fully and explicitly, that there are any such entries, books or papers, under his control, there is an end of the application. He cannot be subjected to a general inquisitorial examination. (See, however, *Higgins v. Bishop*, and *Southurt v. Dwight*, below cited, as containing partial qualifications of the general doctrine thus laid down.)

In the case now under consideration, a referee had been appointed, to ascertain whether a previous order for discovery, obeyed in part, had been fully complied with; with power for such referee to inspect the books of the defendants, for that purpose. It was held that the court had no power to grant an order of that description, either under the Code, or under the former system. In applications under the Code, strictly speak-

ing, the only discretion which the court can exercise is, in determining whether an inspection will be given at all. If it grant a discovery under that section, it has no discretion in directing the manner in which it shall be made. The inspection is to be given, at all events, and the only alternative presented to the adverse party is, either to give a copy, or to submit to the inconvenience of allowing the petitioner to make one. If a party applies under the Code, he should be required to make a case, as strong and urgent as is deemed necessary to entitle him to a production of books or documents, instead of sworn copies. See, however, several cases, below cited, in which a less restricted doctrine is maintained, with reference to this last point.

In the same case the question is further considered, as to the proper course to be taken by the applicant, in the event of an incomplete discovery being made, under an order to deliver sworn copies. It is held, as above noticed, that the appointment of a referee to examine the books of the party is clearly inadmissible. The proper course appears to be as follows: where the sworn copies indicate that the discovery may not be complete, the party should apply to the court, for an order for his adversary to show cause why further copies should not be given; and, unless the control of the documents, or the existence of the entries be denied, a peremptory order should be granted. In that particular case, it was also considered that such copies should be verified by the oath of the president, as well as by that of the cashier of the bank there in question. See likewise, to the same effect, *Meakings v. Cromwell*, 1 Sandford, 698.

In *Brevoort v. Warner*, 8 How. 321, similar views in relation to discovery are entertained, and the same principle is maintained, *i. e.*, that applications for discovery are still governed in all respects by the old chancery practice. The distinction between applications under the Rules, and under the Code, is still more definitely drawn, it being held, that section 388 extends only to inspection, (which implies production,) and a copy, and not to discovery. It is held, as in *Hoyt v. The American Exchange Bank*, that a mere *discovery*, properly so called, should be in no other way than by the examination of the party, on which examination, the production may be accompanied with a statement of every thing which is necessary to protect him from consequences; and the proceeding under the

Rules is only applicable to the production of specified documents, and not to a general discovery. The subject of discovery in general is then examined at great length, and numerous cases cited. Although, by a bill of discovery under the former system, and by an examination of the party now, a full and searching discovery may be obtained from a defendant, still, a mere random fishing inquiry will not be indulged, and the party calling for a disclosure, must first make out a case on his own behalf, entitling him to it. An indefinite search, too, amongst the private books and papers of an adversary, will not be permitted. Where the book or document is described, and its contents known, there can be no difficulty, and the court can determine whether there shall be production and inspection, and to what extent, and in what manner. If the applicant has such an interest, that he has a right to the examination of the whole of the book or document, the examination may be general; and so, of a class of books and documents, as the books kept by the agent of a party, as such agent, or the correspondence between principal and agent, &c., or as to partnership papers. See *Higgins v. Bishop*, 12 L. O. 127; and *Stalker v. Gaunt*, 12 L. O. 132, below cited.

In cases, however, in which there is no such relation or priority, it will not be proper to compel a general and unrestricted examination; but the remedy will be confined to matters specified, and, if a book be specified, and contain entries irrelevant to the applicant's case, the same objection will apply, to that extent. In that particular case, it was held that the defendant was entitled to copies of entries in the plaintiff's books, containing entries of his own credits, or set-offs, but not to copies of the charges against him, unless a strong case requiring relief of that nature be shown. It was likewise considered that, where the applicant's right to a production and inspection is clear, and the request unreasonably refused, costs of the motion may be given.

In *Stalker v. Gaunt*, 12 L. O. 132, the question of discovery under the Code is again very fully and minutely examined, and the doctrine maintained, that applications of this nature will be governed by the former chancery practice. It is there laid down, as a general rule, that, where the information sought is attainable by other means, either by the examination of witnesses, or of the party himself, a discovery ought not to be granted.

The subject of discovery under the Code is also again entered into at great length, and numerous authorities cited, in *Terry v. Rubel*, 12 L. O. 138, which case confirms the proposition laid down in those last referred to, *i. e.*, that a simple discovery, as such, cannot be had, unless accompanied by the examination of the party, and that the process of *subpoena duces tecum* will be appropriate for that purpose. In *Jarvis v. Clerk*, 12 L. O. 129, and also by implication in *Stalker v. Gaunt*, 12 L. O. 124, it is held that process of the latter description is appropriate, and may be enforced, as well with reference to the examination of a party under s. 390 of the Code, as when that examination takes place on the actual trial.

An application for discovery was held not to be debarred by a previous offer to allow judgment on the part of the defendant, where the plaintiff avowed his object to be an amendment of the complaint, in consequence of his having found out that he had not claimed an amount that was due to him. *Merchant v. The New York Life Ins. Co.*, 2 Sandf. 669, 2 C. R. 66; *Id.* 87.

### § 187. *Discovery and Inspection under the Code.*

This subject has been in some measure entered upon under the foregoing head, and particularly in the cases of *Hoyt v. The American Exchange Bank*, and *Brevoort v. Warner*, there cited. This remedy, in contradistinction to the former, is only applicable, as a general rule, to those cases in which issue has been actually joined, and with a view to prepare for trial; and the case to be made out, to entitle an applicant to this species of relief, would seem to require a higher degree of interest in the event to be shown, to warrant the exercise of the discretion of the court. Where, however, the remedy is granted, it is more summary and searching in its nature, than that considered under the previous head.

In cases of this description, the powers under the Code are paramount, and are not in any wise fettered by the restrictions imposed in the Rules, with reference to the peculiar class of applications which are more especially governed by them.

“It certainly was not intended, by the adoption of these Rules, to confine the discovery of documentary evidence to the two cases mentioned in the 8th Rule; on the contrary, it was intend-

ed to leave all proceedings instituted under the 388th sec. of the Code, to be governed by its provisions, uncontrolled and unaffected by the Rules; such, at any rate, is the case. If, therefore, the plaintiffs have presented a case which, under the provisions of the Code, entitles them to a discovery, the Rules cannot operate to deprive them of that right." *Exchange Bank v. Monteath*, 4 How. 280; 2 C. R. 148.

In the same case, it was held that it was not necessary that the affidavit on which the application is grounded should be that of the party: "the facts may be shown by the oath of any other person." And further, that it is not necessary, in such application, for the party to swear that the documents sought to be discovered are not in his own possession. "It is enough for him to show what the statute requires, that they are in the possession or under the control of the adverse party; and, in this respect, it is sufficient if he shows a state of facts which satisfies the court or officer, that the party, against whom the application is made, has the ability to comply with the order for discovery."

In the same decision it is likewise laid down, that, where the application is *bonâ fide*, the order for discovery will be considered almost as of course. "It is true," says the learned judge, "that the application is addressed to the discretion of the court or judge; but, in the exercise of that discretion, no officer would feel himself justified in withholding such a discovery, when satisfied that the application is made in good faith, and that the party against whom it is made, has the ability to comply with the order, and that the books, &c., of which a discovery is sought, contain material evidence."

Such application must, nevertheless, be *bonâ fide* in every respect, or the above rule will not apply. In a case where the circumstances presented strong ground for suspicion that the proceeding was taken for the mere purpose of delay, and the application was made, after the plaintiff had more than once been thrown over the circuit by interlocutory orders, the same judge expressed himself as follows: "It is not a matter of course to grant a discovery under the statute. Some degree of diligence, at least, should be shown; and where, as in this case, it appears that the party making the application is chargeable with gross negligence, if not with bad faith, the order for a discovery ought not to be granted, or, if granted, should not be upheld;" and the order in that case was therefore vacated by

the general term. *Hooker v. Matthews*, 3 Howard, 329; 1 C. R. 108.

In a *bonâ fide* case, however, the mere question of the time at which the application is made, is not a bar to it. Thus, in *The Mechanics' Bank v. James*, 2 C. R. 46, discovery was granted, when the cause was in progress of hearing before a referee, when the necessity for that discovery arose from evidence then introduced by the plaintiff, of which defendant had no previous knowledge.

In *Miller v. Mather*, 5 How. 160, 2 C. R. 101, a similar order was made before issue had been joined, on the principle laid down that relief would be granted in any case, in which, under the old law, discovery might have been obtained. As a general rule, however, an application of this description will, for obvious reasons, be more properly made, after the actual joinder of issue. See *Keeler v. Dusenbury*, 1 Duer, 660; 11 L. O. 287, before noticed.

The power of the court to compel a discovery, is asserted in its fullest extent, in the case of *Powers v. Elmendorf*, 4 How. 60, 2 C. R. 44, where it was held, that that power is unfettered by the restrictions imposed upon it, whilst exercised by the Court of Chancery, or by the Supreme Court, under the provisions of the Revised Statutes. The discovery now obtainable is not confined to the evidence which the party seeking it requires for his own title, but it extends to the enabling each party to ascertain what documentary evidence his adversary holds, and upon which such adversary is relying to maintain himself upon the trial. (See, however, *Brevoort v. Warner*, above referred to, by which this doctrine is partially qualified, though not denied *in toto*.)

The order granted in *Powers v. Elmendorf* extended, therefore, to the production and delivery of copies by the defendants, of all papers and documents "upon which they would rely at the trial," "as containing evidence to sustain the allegation in their answers," on which they relied in opposition to the plaintiff's claim. And leave was given to the plaintiffs, should the defendants fail to comply, "to apply for a further order that any papers or documents, of which, by the terms of the order, copies ought to have been furnished, shall be excluded as evidence upon the trial; or for such other appropriate order as the circumstances may justify. The first order may be made by a judge or justice out of court, but the second order can only be

made by the court, upon evidence of a refusal to comply with the first."

The power of the court, in case of a refusal to produce, does not extend, however, to compel the defendant to make any admission of the plaintiff's case, beyond what would be implied from a neglect to plead. *Follett v. Weed*, 3 How. 360. The plaintiff is, under such circumstances, "to be placed in the same situation in which he would have been, if the defendants had suffered default for want of a plea." "The amount of his recovery must, of course, depend on his proof of the amount of injury sustained. Under the measure of 1848, the powers of the court extended only to papers, and not to books. See earlier report in same case, 3 How. 303, 1 C. R. 65, but that defect is now remedied.

An offer to allow the plaintiff to take judgment for the amount of his claim, under sec. 385, was held to be no bar to a motion for discovery, where the plaintiff avowed his intention to amend his complaint, having discovered that he had not demanded all that was due to him. *Merchant v. New York Life Insurance Company*, 2 Sandf. 669, 2 C. R. 66, further reported, 2 C. R. 87.

### § 188. *Mode and Course of Application.*

*Petition proper Form.*—In *The Exchange Bank v. Monteath*, 4 How. 280, 2 C. R. 148, above cited, the court was disposed to consider that an application of this nature might be made on affidavit only, without being founded on a petition, as required by the Revised Statutes. Even if this doctrine be admitted, it is clearly only applicable to a motion under sec. 388, and not to that class of cases which fall peculiarly under the provisions of the Rules. Rule 9, as regards these cases, expressly provides the contrary. In any case, however, the proceeding by petition will be admissible. See *Follett v. Weed*, *Lovell v. Clarke*, and other cases, above cited, in reference to the provisions of the Code and the Rules being concurrent; and, in *Dole v. Fellows*, 5 How. 451, 1 C. R. (N. S.) 146, it was expressly held that the application must be grounded on petition in all cases, and a motion, on affidavit only, was accordingly denied.



An application by petition will therefore be, at all events, the most prudent mode in all cases. For forms, see Appendix.

A copy of the petition and affidavit of verification, and of any other affidavits or evidence, if any, to be used on the motion, must be served on the opposite party, with the usual notice of motion grounded thereon. See Appendix. Or, the notice may be framed in the form of an order to show cause, if an interim stay of proceedings be advisable.

*Opposition to Motion.*—It is, of course, competent to the party against whom relief is sought, to oppose it, on the return of the notice or order, on any of the usual grounds, and to introduce counter affidavits for that purpose. Those affidavits must, however, be certain and positive. Where, therefore, a defendant swore that he had no recollection “of a receipt asked for, that he had searched for it, but without finding it, and that he believed it was lost or mislaid, and, to the best of his knowledge or information, no such receipt was in his possession, or under his control,” such excuse was held to be insufficient. “A party, to excuse himself from making a discovery of any papers, alleged on oath by the adverse party to be in his possession, must make an affidavit in the terms prescribed by the Revised Statutes, and swear positively that the papers are not in his possession, or under his control.” *Southart v. Dwight*, 2 C. R. 83, 2 Sandford, 672. “He must make such an examination as to enable him to do this, or state facts, with his denial, when expressed as it is here, which will show that such denial is equivalent to the positive oath required by the statute.”

Where, however, the party makes a positive and complete denial to the latter effect, there is an end of the application. See *Hoyt v. The American Exchange Bank*, above cited. See, however, *Higgins v. Bishop*, 12 L. O. 127, below referred to. The only course to be pursued, under those circumstances, will be an examination of the party. See same case, and also *Brevoort v. Warner*, before noticed. And the production of the documents required may, under these circumstances, be compelled by the ordinary process of *subpœna duces tecum*. See *Bonesteel v. Lynde*, *Stalker v. Gaunt*, *Higgins v. Bishop*, and *Jarvis v. Clerk*, as cited in the last section, overruling *Trotter v. Latson*, to the contrary effect, as there detailed.

If the motion for a discovery or inspection be refused, the prevailing party will be entitled to draw up and serve the order thereupon, in the usual manner, though, unless an interim stay of proceedings have been obtained, this will scarcely be requisite.

*Course of Applicant, when Motion granted.*—If the order be granted, care must be taken, in framing it, to comply with the requisites of Rule 10, as above cited, and to specify the mode of such discovery, the time within which it is to be made, and, if a deposit be directed, the period for which such deposit is to continue, as thereby prescribed. See Appendix. It must, of course, be drawn up, and served upon the opposite party, in the usual manner.

The effect of the granting of such an order, in indefinitely extending the time to plead, as regards the party by whom it is obtained, and effecting a general stay of proceedings, until complied with or vacated, will have been noticed under Rule 11. Of course, the stay of proceedings hereby granted expires, *ipso facto*, on a due compliance with the order, without any necessity for a further application to the court.

The mode of enforcing a full and efficient compliance with an order of this description, and the penalty for its disobedience, have been already in part considered. See *Powers v. Elmendorf*, *Hoyt v. The American Exchange Bank*, and *Follett v. Weed*, above cited. It will be observed that the remedy is much more summary under the Code, than under the Revised Statutes. In fact, there seems no limit to which the powers of the court to "punish the party refusing," might not be carried, in an extreme case, though, as yet, no instance of the kind appears to have occurred. An application for a commitment for contempt, made in the ordinary form, is the evident remedy for an extreme case of this description, should such a case arise. Under ordinary circumstances, an order, excluding the document from being given in evidence, according to the course prescribed in *Powers v. Elmendorf*, will be sufficient to insure justice between the parties. Where, however, the document retained by the adverse, is essential to the case of the moving party, an application for a commitment will be clearly appropriate, or the motion might possibly be made, that the pleading of the adverse party be stricken out altogether, and judgment given in

favor of the applicant. That mode of "punishment," (to use the terms of the section,) seems highly appropriate, and this view is confirmed by *Bonesteel v. Lynde*, 8 How. 226, affirmed 8 How. 352, above cited, in which an order of that description was granted, on the fraudulent neglect of the defendant to produce a paper, essential to the plaintiff's case, under a *subpoena duces tecum*; a state of circumstances which presents an evident analogy with that here in question.

*Mode of Proceeding in referred Cases.*—The power to order the production of books, &c., is limited to the court, or to a justice thereof, and cannot be exercised by a referee, even of the whole issue, where there is no special provision to that effect, in the order of reference. Where, however, a referee is ordered to take accounts, his certificate that the production of books and papers is necessary, will be presumptively sufficient to warrant an order for their production, and the burden of showing the contrary will lie on the adverse party. *Fraser v. Phelps*, 3 Sandf. 741; 1 C. R. (N. S.) 214. In such a case, therefore, the referee's certificate should be obtained at once, and an application be made to the court thereon in the usual manner, either on notice or on order to show cause.

As, however, the necessity of such production will usually be anticipated, at the time when the reference is actually made, an original provision to that effect will be the more advisable course, and will save trouble in the subsequent proceedings.

In *Fraser v. Phelps*, again reported 4 Sandf. 682, it is expressly held that, on a reference to take an account, in a clearly equitable suit, the court will grant express power to the referee to compel the production of such books and papers as may be necessary, and will enforce his directions in that respect, by attachment, to be granted on a previous order to show cause, on the return of which, the question of the propriety of that direction may be inquired into and passed upon. The Code does not limit or abridge the powers which Courts of Equity were accustomed to exercise, in suits for an account, and will clothe the referee with the same authority, as that of a master under the old practice.

This view is confirmed by *Higgins v. Bishop*, 12 L. O. 127, and it was held that, in a case of taking accounts, as regards parties, between whom a right and liability to account is estab-

lished, an order of this description will be granted, notwithstanding the adverse parties may have made the statutory oath, as to the absence of material entries. The party entitled, as of right, to an examination, is not bound to be satisfied with the oath, under these circumstances. He is entitled, as under the old practice, to examine the books, and to judge for himself, whether there are entries in them material to the cause, the usual course as to sealing up other entries being observed. The application in that case being framed under the Code, and not under the Revised Statutes, was, on that ground, denied, but without costs, an election being given to the plaintiff, either to apply for an order of the above description, authorizing the referee to require the production and deposit with him of the books in question, or, to examine the defendant on *a subpoena duces tecum*.

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## CHAPTER VII.

### EXAMINATION OF PARTIES.

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#### § 189. *Nature of Remedy.*

*General Remarks.*]—The provisions of the Code in this respect, are an amplification of an original measure upon the subject, c. 462 of the Laws of 1847, the most important provisions of which are incorporated in the present enactments.

The views of the commissioners, in submitting those provisions to the legislature for their approval, are thus stated by them in pages 241 and 245 of their report: "One of the great benefits to be expected from the examination of parties, is the relief it will afford to the rest of the community, in exempting them, in a considerable degree, from attendance as witnesses, to prove facts which the parties respectively know, and ought never to dispute, and would not dispute, if they were put on their oaths. To effect this object, it should seem necessary to permit the examination beforehand, that the admission of the party may save the necessity of a witness."

*Substitute for Bill of Discovery.*—This sentence seems more peculiarly to point to the relief to be afforded, in bringing an ordinary common law action to trial. Another most important object is, however, answered by the provisions in question, and that is, the fulfilment of the purposes which, in chancery cases, were answered by a bill of discovery, and also by the ordinary interrogatories in a bill in equity, of whatever nature. The latter form no part of the system of pleading as provided for by the Code, whilst the former is expressly abolished. The only remedy, therefore, that parties now possess in these respects, will be, for the future, under the provisions about to be considered.

Those in the preceding chapter are inefficient, for the purpose of discovery generally considered. They only enable a party to call for specified documents or entries. Discovery, as heretofore obtainable in equity, can only be had by means of the present form of application, and, where the production or discovery of documents is sought to be collaterally obtained, the proceedings under this chapter should be accompanied by the ordinary process of *subpœna duces tecum*, under which the party will be compellable to produce them, in the same manner as an ordinary witness, on the trial of a cause, subject to his power to object to, and that of the court to qualify, the extent of the production and inspection by the adverse party, as heretofore exercised, on the production of documents, at the actual trial of a cause. See these subjects heretofore considered in the two preceding chapters, under the head of Discovery under the Code and Rules, and of *Subpœna*. See likewise the different cases there cited, including as follows, viz. : On the general question, *Hoyt v. The American Exchange Bank*, 1 Duer, 652, 8 How. 89; *Brevvoort v. Warner*, 8 How. 321; *Stalker v. Gaunt*, 12 L. O. 124; *Same case*, 12 L. O. 132; *Terry v. Rubel*, 12 L. O. 138; *Higgins v. Bishop*, 12 L. O. 127. As to the remedy by *subpœna duces tecum*, *Bonesteel v. Lynde*, 8 How. 226, affirmed 8 How. 352; *Stalker v. Gaunt*, 12 L. O. 124; *Higgins v. Bishop*, 12 L. O. 127; *Jarvis v. Clerk*, 12 L. O. 129, (which is express authority, that the process of *subpœna duces tecum* is applicable to this peculiar mode of examination, *Stalker v. Gaunt* being implied authority to the same effect;) *Stalker v. Gaunt*, further reported, 12 L. O. 132; *Terry v. Rubel*, 12 L. O. 138, overruling *Trotter v. Latson*, 7 How. 261. The above cases are also in point, to the effect

that the examination, for the above purposes, most of necessity be conducted, so far as the discovery of documents is concerned, on the principles in force in Courts of Equity, under the former practice, in relation to the proceeding by bill of discovery; and as to the rights and liabilities of the parties respectively, in connection with that form of proceeding.

The actual view taken in the above case is in fact clear, from the proviso of the Code itself, abolishing the former proceeding by bill of discovery, as thus contained in sec. 389:

§ 389. No action to obtain discovery on oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

In *Dunham v. Nicholson*, 2 Sandf. 636, it was held that the prohibition in this section does not apply to an action in the nature of a former creditors' suit, where an execution had been issued and returned unsatisfied, before the operation of the Code. "That provision does not apply to the examination of a debtor touching his property, but to the ordinary discovery, sought by bill, and made by answer. This proceeding is in aid of an execution, on a judgment already obtained. The creditors' suit, in respect to existing cases, is not in terms abolished, and there is no other remedy open to the plaintiff. All existing remedies not inconsistent with the Code, were retained." See also *Quick v. Keeler*, Id. 231.

The prohibition clearly extends, however, to all such proceedings, in an actually pending action, with a view to the trial and prior to judgment.

### § 190. *Mode of Examination.*

[*Statutory Provisions.*]—The examination of a party to the action, may take place either at, or previous to the trial. The provisions for this purpose are contained in sections 390 and 391, which run as follows:

§ 390. A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and, for that purpose, may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

§ 391. The examination, instead of being had at the trial as provided in the last section, may be had, at any time before the trial, at the option of the party claiming it, before a judge of the court or county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined, shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

The question as to how far parties so examined, are or are not competent to testify, or how far their testimony is or is not receivable, will be considered in the succeeding chapter. The remarks in the present, will be confined to the formal proceedings to be adopted on such examination, when the same takes place in a preliminary form, as above provided, and to the cases immediately bearing upon that point.

In *Brockway v. Stanton*, 2 Sandf. 640, 1 C. R. 128, it was held, that there is nothing in the remainder of the Code to qualify the above provisions, with reference to the examination of a party by commission, out of the State, and that he can accordingly be so examined.

*When Examination may be had.*—Considerable discrepancy of opinion has existed, as to the extent of the powers conferred, in relation to the examination of parties before trial. The point on which that discrepancy has chiefly existed, has been as to whether that examination can, or cannot be had, before issue joined.

In *Balbani v. Grasheim*, 2 C. R. 75, the plaintiffs requiring to examine the defendant, with a view to prepare the particulars of their demand; the court dismissed their application for that purpose, holding "that a party could not be examined before issue joined; and that, after issue joined, he was placed on the same footing, and could only be examined under the like circumstances as an ordinary witness." See, also, *Bennett v. Hughes*, 1 C. R. 4.

If the principles here laid down be carried out to their full extent, it is obvious that they amount to a complete nullification of the remedy formerly obtainable by bill of discovery. The case in question cannot, therefore, be considered as of authority. It is, in fact, virtually overruled by the effect of the decisions below cited.

In *Miller v. Mather*, 5 How. 160, 2 C. R. 101, it was held, on the contrary, "that a party to the suit may be examined as a witness, before the joining of issue in the action. Such examination being provided by the Code, as a substitute for the former bill of discovery, is governed by the rules applicable to such bills, and a discovery, by bill of discovery, might be had at any time during the progress of the suit."

In *Tuggard v. Gardner*, 2 Sandf. 669, 2 C. R. 82, it is laid down, unconditionally, that a defendant may be examined as a witness, before the trial, without an order being first obtained.

In *Partin v. Elliott*, 2 Sandf. 667, 2 C. R. 66, the objection was taken that a party could not be examined before the trial, unless on the grounds prescribed in the Revised Statutes for taking testimony in that manner: but such objection was overruled by the court, and an unconditional order for the examination of the party made, the following principles being laid down: "The 391st section is positive and express, that the examination may be had before the trial, at the option of the party claiming, and that, instead of being had at the trial. The examination before the trial was designed to aid parties in preparing for trial, irrespective of the residence of the party sought to be examined, or the probability of his being able to attend the trial." See, also, *Anderson v. Johnson*, 1 Sandf. 713; 1 C. R. 95.

In these last cases, the cause was at issue at the time of the application, and the necessity of such being the case, in order to an application of this nature, is strongly insisted upon in *Chichester v. Livingston*, 3 Sandf. 718; 1 C. R. (N. S.) 108. It is, however, virtually admitted that such an examination may be necessary, in order to enable the party seeking the discovery to answer or reply; but it is held, that, in such cases, "an examination ought not to take place, unless by special order of the court, on cause shown by affidavit, as to the necessity of the examination."

It is also admitted, that an examination of a party about to depart out of the jurisdiction, might be an exception, and that, on a proper application, "such examination might doubtless be had before issue. The conclusion come to is thus summed up:

"As this is an interesting and important question of practice, I have conferred with all my associates, and they are all of opinion, with me, that, where a party is examined as a witness,



before the trial, merely for the purpose of avoiding the necessity of calling him at the trial, then such examination can only take place after issue joined.

"I do not mean to decide, nor is it necessary to determine, in disposing of this motion, whether a party can be examined by his adversary, in order to enable the adversary to answer or reply. It is possible that a case might be presented, where it would be evident that the ends of justice required such an examination before answer or reply, even under the present law, which gives the absolute right to such examination after issue joined."

In *Keeler v. Dusenbury*, 1 Duer, 660, 11 L. O. 287, it was held that an examination of this nature cannot be had, for the purpose of proceedings to perpetuate testimony. It is also held that a defendant cannot be examined, as of course, under the provisions now in question, after service of summons only, and with a view to enable the plaintiff to frame his original complaint; and the propriety of granting such an application is doubted, without strong affidavits, showing its necessity to enable the plaintiff to obtain redress. In *Roche v. Farran*, 12 L. O. 121, a similar view is taken. The subject of discovery in general is entered upon at length, and it is considered that the provisions of the Code have, in effect, annulled the right of a plaintiff to have a discovery, as such, before action. The Code only gives the remedy, as above, in an action actually pending, and seems to presuppose that the complaint has been drawn, in cases where a summons for relief is proper. The application for leave to examine the defendant in the first instance, was therefore denied, on the ground that the facilities given for amendment, on the coming in of the first answer of the defendant, and for examination of the defendant at large, after such answer has come in, render such a mode of procedure wholly unnecessary.

The conflict in opinion which exists in the above decisions seems, however, on examination, to be more apparent than real. Those in *Balbani v. Grasheim*, and *Bennett v. Hughes*, may be fairly laid out of the consideration. The latter was pronounced at so early a period, and is so entirely at variance with subsequent decisions, that it may be disregarded. The Code has failed to draw a distinction, between proceedings of a legal and equitable nature, and between examinations for the

purpose of preliminary discovery, and those intended as part of the preparations for actual trial, and instituted with a view to the examination of the party being read on that occasion, instead of his evidence being taken, *vivâ voce*. If this distinction be drawn, the above cases appear, in all main points, to be reconcilable, notwithstanding their apparent discrepancy. In examinations of the latter nature, the party is, under sec. 395, at liberty to testify on his own behalf, "on any matter pertinent to the issue," and this can hardly be the case before issue is joined, a point strongly insisted on in *Chichester v. Livingston*. On the other hand, in proceedings taken in lieu of a bill of discovery under the old practice, a denial of the examination until after issue joined, would amount to a practical denial of any remedy in the premises, a result which could hardly be contemplated, and might even be held to be unconstitutional. In *Chichester v. Livingston*, the powers of the court to grant relief of this nature on a special application are not denied, but, on the contrary, virtually admitted; and the due exercise of that power, will practically obviate the inconvenience which might otherwise be experienced. The cases of *Keeler v. Dusenbury*, and *Roche v. Farran*, are both "*sui generis*," and there can be little, if any doubt, that the doctrine there held is sound, and will be upheld in practice, a special application to the court being always feasible, should a special state of circumstances arise, which may properly call for a special interposition.

*Notice to Defendant, or Order in lieu thereof.*—The form of the notice prescribed by sec. 391 will be found in the Appendix.

In *Taggard v. Gardner*, 2 Sandf. 669, 2 C. R. 82, it was held, that all that is necessary, in order to obtain an examination of the opposite party, under sec. 391, is to give such party a notice of at least five days, and that "the only case in which an order for the examination is necessary, is where the party seeking it wishes it to be had on a shorter notice than five days." This view seems clearly correct, and in exact conformity with the statute. It was also held, in the same case, that, in addition to the notice, he should be served with a subpoena in the usual manner, whereon to ground proceedings to compel his attendance, in the event of his refusing to obey the notice in the first instance. In *Jarvis v. Clerk*, 12 L. O. 129, this conclusion is

reviewed, with reference to the provision under section 392, that a party so examined may be compelled to attend, in like manner as a witness who is to be examined conditionally, and it is held that the proceedings in an examination of this nature, are to be substantially governed by the Rules prescribed by the Revised Statutes, in relation to the examination of witnesses *de bene esse*; and that, although a subpoena is not necessary, a summons on the part of the court is, and that such a summons must be obtained, and served accordingly, accompanied by the ordinary process of *subpoena duces tecum*, in cases where a discovery is sought, in addition to the personal examination of the party. It was held therefore that, with a view to ulterior proceedings at all events, a mere notice under the Code is not sufficient, but a summons of the above nature ought to be obtained and served.

The result of these decisions seems to be, that, where no material opposition is expected, a simple notice under the Code will probably suffice, to insure the attendance of the party, and to render the examination, when taken, admissible for all purposes, in the event of his attendance, and submission to be examined. The notice in question must distinctly specify the time and place of examination, and must be duly served. It must also be served upon "any other adverse party," or the proceeding will be irregular, and the examination useless for all practical purposes.

In cases where a strenuous opposition is expected, it seems that the course prescribed in *Jarvis v. Clerk* will be unquestionably prudent, if not absolutely indispensable, and that it will be the more convenient course, to obtain and serve in the first instance, an *ex parte* order to the same effect as the notice in question. This mode of proceeding appears to be in general use, and was adopted in the majority of the cases above cited, while it presents many independent advantages, particularly with reference to ulterior proceedings, as before noticed.

If an order of this description be obtained, it should point out the consequences of a non-attendance, or a second order, involving those consequences, cannot be obtained on a default taken under it. *Anderson v. Johnson*, 1 Sandf. 713; 1 C. R. 95. See form of order in Appendix. It seems advisable to take the same course on a notice also, and the form given is adapted accordingly.

In *Anderson v. Johnson*, above cited, it was held that a defendant might be examined within a district, not his actual residence, but in which, the order, and all other papers in the cause, had been served upon him; and, likewise, that a defendant, under such circumstances, "should be treated as a witness, and must be paid his fees, before he could be required to attend."

*Course of Examination.*—The mode of procedure, and the final disposal of the deposition, when taken, is provided for by sec. 392. It is to be taken and filed by the judge, in the same manner as an examination taken *de bene esse* under the Revised Statutes, and may be read by either party on the trial. In practice, however, the examination is rarely taken by the judge in person. It is usually conducted at the chambers of the court, or elsewhere, by consent, the evidence being taken down by the examining party, and any questions that may arise, pending that examination, submitted to the judge for his decision, either each *pro re nata*, or several at one time, as may be most convenient. The admissibility of questions asked, are clearly matters proper for decision at the time: the admissibility of the evidence given in answer to those questions, will, as a general rule, be reserved for consideration, when the deposition comes to be made use of at the trial, and not passed upon during the actual examination, the objection being simply noted on the deposition.

When an adjournment takes place, pending the examination, it should be noted on the deposition, or, more usually, on the notice or order under which the party attends, and the judge's signature should be obtained to it. At the close of each day's proceedings, the party should sign that portion of the deposition, and be sworn to it, so far, and the usual jurat annexed and signed by the judge. The same ceremony must, of course, be observed at the conclusion of the deposition, whenever completed. The party must necessarily be sworn in the first instance, and the only correct practice will be that, before his final signature, the deposition should be read over to or by him, and any errors corrected, before he signs it. When done, it ought to be filed at once with the clerk of the court, as, if this be omitted to be done within a reasonable time, it cannot be read at the trial. Ten days would appear to be a reasonable time for such purpose, by analogy with the provisions of the Revised Statutes, in relation to the filing of a deposition taken

*de bene esse*. See 2 R. S. 392, s. 6. It is very usual in practice, however, to retain the deposition in the hands of the moving party for a reasonable period, in order to the greater convenience of taking copies for use, and, when proceedings are conducted in a proper spirit on both sides, there can be no practical objection to this course. It is, of course, competent to them to waive, in like manner, any other of the formal requisites above prescribed, as by taking the deposition at the office of one of the parties, swearing to it before a commissioner, &c., if they choose to do so. In practice, however, the attendance before a judge will be usually found more convenient, as it is the usual course, on account of the probability of questions arising as to the nature and course of the examination, which he, and he alone, will be competent to dispose of. The above few remarks will be a sufficient guide, in relation to the conduct of such an examination, under ordinary circumstances; which, in its formal features, bears a close analogy to the taking of testimony *de bene esse*, and is governed by substantially the same rules.

The legal effect of an examination taken under these provisions, appears to be precisely that of an answer in chancery, under the old practice. It is conclusive upon the party examining, unless and until it is disproved. *Sheldon v. Weekes*, 7 L. O. 57.

In some respects, however, the examination under these provisions, presents peculiar and exceptional features, which must be shortly adverted to. The first of these, has reference to the peculiar relations of the party, in contradistinction to those of an ordinary witness. These peculiar characteristics will, therefore, be shortly considered as follows:

*Right to rebut Testimony of Party.*—By sec. 393, it is expressly provided that—

§ 393. The examination of the party thus taken, may be rebutted by adverse testimony.

In *Armstrong v. Clark*, 2 C. R. 143, the court held that, after calling the defendant as a witness on the trial, the plaintiff might call other witnesses to rebut his testimony, if he think proper; the decision being based upon the foregoing section.

It follows, from the very nature of this provision, that the examination of the party differs materially from that of an ordi-

nary witness, in this particular, viz.: that the examining party is entitled to conduct it in the nature of a cross-examination, and may ask any questions which, on actual trial, might be put to an adverse witness. This consequence, though not expressly provided for, follows of necessity, from the very nature of this remedy, and from the admitted principle, that it is intended to stand in the place of, and is the only substitute for a discovery under the old practice. To contend that an adverse party is not, of necessity, an adverse witness, and ought not to be treated as such on his examination, involves an absurdity, too great to be seriously contended for. On this account, probably, there is no specific decision, directly in point, upon the subject; but, in examinations of this nature, the principle is, it may safely be said, universally admitted. The point was expressly ruled by *Hoffman, J.*, on the examination of the defendant in *Stalker v. Gaunt*, before noticed, though the decision, being interlocutory in its nature, and having been submitted to as soon as made, has never, of course, been reported.

*Right of adverse Party, examined, to testify in his own behalf.*]—The following provisions are made by sec. 395, respecting the conduct of the examination, and the rights of the adverse parties to testify, each in his own behalf, under certain circumstances:

§ 395. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, in respect to any matter pertinent to the issue. But, if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge, when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf, in respect to such new matter, and shall be so received.

In *Myers v. McCarthy*, 2 Sandf. 399, it was held that where a plaintiff, so examined, testifies to new matter, in answer to a question put to him by the court, the defendant is equally entitled to tender his own evidence, in respect to such new matter.

The effect of evidence so given is, however, open to all proper comments, arising out of the peculiar position of the party who gives it. The court and jury are not bound to believe the party so testifying, and to decide according to his testimony.

It was the intention of the Code, in giving these powers, to confer a wide discretion, as to the credit to be given to this description of evidence; and the rule, as now established, permits the court and jury to believe that part of an admission, which charges the party who makes it, and to disbelieve that part which discharges, where the latter is improbable on its face, or is discredited by the other testimony. *Roberts v. Gee*, 15 Barb. 449.

*Examination of Parties interested.*—The following provision is made by section 396, as regards parties interested in the action:

§ 396. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

A party may also be examined on behalf of his co-plaintiff or co-defendant, under certain restrictions, under sec. 397, as cited in the next chapter.

It was held, under the Code of 1848, that co-defendants could not be examined by each other, without a special order, as provided by No. 63 of the late Supreme Court Rules, in equity. *Roberts v. Thompson*, 1 C. R. 113; *Taylor v. Mairs*, 1 C. R. 123. Under the present provisions, there seems to be no distinction to be drawn between this case, and that of a party adversely examined, as regards the form of the proceedings. It might, however, be the more prudent course, to obtain an order in all cases, as before noticed. The provisions for enforcing the attendance of such parties, were not in the measure of 1849, but were inserted on the amendment of 1851.

The examination of an assignor of a chose in action, is also specially provided for by sec. 399, as cited in the next chapter. This provision is, however, more peculiarly applicable to an examination upon the actual trial.

See this, and the foregoing subject, more fully considered, in the succeeding chapter, and the cases there cited.

### § 191. *Refusal to testify.*

The effect of a refusal to attend and testify, when duly required, is thus provided for by sec. 394:

§ 394. If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer, or reply, may be stricken out.

In order to ground the taking of an order, to the effect of the last portion of this section, by default, the original notice, or order to show cause, should clearly point out that such an application will be made, or the order on default will be refused. "Good reasons might be shown, why, even on the disobedience of the party, some other penalty than striking out his defence should be imposed." *Anderson v. Johnson*, above cited. It was also considered, in that case, that a joint defence could not be stricken out, on the ground of such a refusal, on the part of one only of such parties.

The prerequisites, in relation to service, &c., in order to obtain an order of the nature here provided, have been already treated in the previous section. See that section, and the different cases, especially that of *Jarvis v. Clerk*, there cited.

Under ordinary circumstances, the course adopted by the court will probably be to punish the party for a contempt. See *Anderson v. Johnson*, and *Taggard v. Gardner*, above noticed. In *Bennett v. Hughes*, however, 1 C. R. 4, it was considered that the court possessed no such power, and that the applicant was confined to the remedy given by the law of 1847. This decision was under the Code of 1848, and its authority appeared doubtful, even under that measure. Under the section, as it now stands, there can be no doubt of the power of the court in this respect.

In extreme cases, however, and where actual fraud is shown, or, where the whole of the moving party's case evidently depends upon the testimony of the party sought to be examined, the remedy of striking out the pleading of that party will be appropriate, and, on a proper application, will doubtless be granted. In *Bonesteel v. Lynde*, 8 How. 228, affirmed, 8 How. 352, relief of this description was given, in the analogous case of a party required to produce, on a *subpoena duces tecum*, a document on which his adversary's case rested, and which he had fraudulently obtained; and the same principle would necessarily govern, in the event of a refusal to testify, involving similar consequences.



## CHAPTER VIII.

OF THE RULES OF EVIDENCE, AS AFFECTED BY THE CODE.

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§ 192. *General Outline of Subject—Statutory Provisions.*

To enter into any examination of the law of evidence in general, would clearly be beyond the scope of the present work. The following observations will, therefore, be confined to the provisions made by the Code upon that subject, and to the decisions bearing upon those provisions, without any attempt at its more extended consideration.

The provisions of the Code, in the above respects, are as follows:

By sec. 397, it is provided as under, in relation to the examination of co-plaintiffs or co-defendants:

§ 337. A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate, and not joint verdict or judgment can be rendered. And he may be compelled to attend, in the same manner as at the instance of an adverse party, but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the cases mentioned in sections three hundred and ninety and three hundred and ninety-one, one of the several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received.

The following provisions are made by secs. 398 and 399, in relation to witnesses in general:

§ 398. No person offered as a witness, shall be excluded by reason of his interest in the event of the action.

§ 399. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. When an assignor of a thing in action or contract is examined as a witness, on behalf of any person deriving title through or from him, the

adverse party may offer himself as a witness to the same matter, in his own behalf, and shall be so received. But such assignor shall not be admitted to be examined, in behalf of any person deriving title through or from him, against an assignee, or an executor or administrator, unless the other party to such contract or thing in action, whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless at least ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party.

An analogous reform to the above has already been accomplished in England, by the Act 6 and 7 Vict. c. 85, from which measure, the two last sections, as they stood before the last amendments, were taken almost *verbatim*. A collection of English decisions upon the subject, will be found at 1 C. R. 55.

The more convenient mode of treating the subject proposed, will be to consider, in the first place, the cases bearing upon the examination of parties as such, and, in the second, those in relation to witnesses in general; although the two subjects are necessarily dependent upon each other, and many of the authorities upon either subject have a double bearing upon both.

### § 193. *Evidence of Parties, as such.*

*Of Co-plaintiffs and Co-defendants, how far admissible—Test of admissibility.*—[The law on this subject is now clearly defined by sec. 397, as above cited. Where parties sue, or are sued, simply and exclusively as joint debtors or joint contractors, their evidence is clearly inadmissible, to charge or discharge other parties in the same interest. Where the right or liability is joint and several, the power or propriety of a several judgment being entered, will form the criterion of admissibility or non-admissibility. The cases bearing on this subject, both before and after the amendment of 1851, which defined the law, as above, will be noticed. On examining these cases, a very material distinction will be perceived, between actions on contracts, and those sounding *in tort*. In the latter, the admissibility of the evidence of co-defendants may be looked upon as the general rule; in the former, it rather constitutes the exception. The analogous question, as to the evidence of interested

persons, not actual parties to the action, will be entered upon in the next section.

Under the Codes of 1848 and 1849, the extent to which the evidence of co-plaintiffs and co-defendants might be made use of, under the powers conferred by sec. 397, became the subject of long and doubtful discussion, and the point remained to a great degree unsettled, until provided for by the recent amendments in that section, although a result, in accordance with those amendments, was in process of being arrived at.

In *Merrifield v. Cooley*, 4 How. 272; and *The Mechanics and Farmers' Bank v. Wilbur*, 2 C. R. 33, the principle now expressly adopted, *i. e.*, that joint contractors or joint debtors cannot be admitted to testify on behalf of each other, and that the propriety or non-propriety of a several judgment being entered, is the proper test by which the admissibility of parties offered as witnesses is to be tried, was distinctly laid down.

In *Henry v. Henry*, 8 Barb. 588, where a judgment confessed by fraud was sought to be set aside, and re-payment of moneys received under it obtained, as against the confessee; the evidence of the party who confessed such judgment was rejected, on the ground of his having an interest in having the amount sought to be recovered, applied in extinguishment of the judgment against him.

In *Dodge v. Averill*, 5 How. 8, it was held that, in an action before the Code, a defendant in tort, upon whom process had not been served, could not be examined on behalf of his co-defendant. Section 399 excludes him, said the learned judge, as being a party to the action, and also interested.

In *Thompson v. Blanchard*, however, 4 Comst. 403, where one defendant in trover had pleaded, and the other suffered judgment by default, the latter was held to be a competent witness against his co-defendant.

Of course, the authority of the latter decision is dominant. A like conclusion is come to in *Robinson v. Frost*, 14 Barb. 536, where, in an action in tort, against two defendants, it was held that one of them, who had not been served, was no longer a party, and was therefore a competent witness for either side; and, on the same ground, it was held that the examination of a defendant so situated, did not authorize the examination of a co-plaintiff, on behalf of the plaintiffs, under sec. 395. See likewise *Leach v. Kelsey*, 7 Barb. 466, below cited.

The converse of the foregoing proposition, *i. e.*, that the separate acts of individual defendants in tort, ought not to be admitted in evidence, to charge defendants not present, in the absence of any proof of conspiracy, is held in *Carpenter v. Sheldon*, 5 Sandf. 77.

In *Parsons v. Pierce*, 3 C. R. 177, 8 Barb. 655, it was held that, in actions of tort, since the Code, a defendant might be called as a witness on behalf of his co-defendant, but his testimony was, in that case, to be confined to facts to go in total exoneration of the party calling him, and he was not to be allowed to testify on the question of damages, in reducing which he had an interest. The decision was that of a majority at general term, *Shankland*, C. J., dissenting as to the exclusion of the testimony of the particular witness there in question, but not on general grounds. In the course of his opinion, in which the law on the subject is elaborately examined, that learned judge lays down the following general principle: "Upon the fullest consideration, I have no doubt that, in actions commenced since the Code, a plaintiff or defendant may, in all cases, call their fellow-plaintiff or defendant to testify to all questions pertinent to the cause, and that judgment may be entered in accordance with the facts, in every diversity of form, as was formerly done by decrees in the Court of Chancery."

In *Munson v. Hegeman*, 10 Barb. 112, reported as *Munson v. Hagerman*, 5 How. 223, it was decided that one of two defendants charged with a joint offence, could not be a witness for the other. The first clause of sec. 397 was intended as a substitute for the old rule in chancery on the subject, under which, co-defendants in the same interest could not be examined for each other. A similar view appears to have been taken by the New York Common Pleas, in a case of *Johnson v. Wilson*, referred to in 1 C. R. (N. S.) p. 40, in note.

The decision in *Munson v. Hegeman*, has, however, been reversed by the Court of Appeals, 12th April, 1853, on the ground that, as separate judgments might be entered in such cases, either defendant might avail himself of the testimony of the other.

In *Finch v. Cleveland*, 10 Barb. 290, it was held that, in an action of trover against three defendants, in which the acquittal of one did not necessarily lead to the discharge of the other, one defendant might be examined for his co-defendants, under this section, as it stood before amendment.

In *Labar v. Koplin*, 4 Comst. 547, it was held that where, on a trial for a joint assault, no evidence appeared against one of the parties, he was entitled to be discharged, for the purpose of being examined as a witness against his co-defendant. If, however, there is any, even the slightest evidence against him, he cannot be so, and the case must go all together to the jury, his evidence of course being inadmissible under such circumstances.

In *Selkirk v. Waters*, 5 How. 296, 1 C. R. (N. S.) 35, the view taken in *Parsons v. Pierce* is confirmed; and it was held, in opposition to the views of the court below, in *Munson v. Hegeman*, that a defendant may be examined as a witness in behalf of his co-defendants, in all cases where a separate judgment may be entered in favor of the latter, and that such co-defendant is, therefore, a competent witness in all joint and several actions, whether on contract or on tort. He is also a competent witness in joint actions, to prove any personal defence admitting of a separate judgment, on behalf of his co-defendant. In no case, however, can his evidence be received, on any matter in the action in which he is interested, either generally, or by way of mitigation of damages for which he is jointly liable. The evidence must, under any circumstances of this kind, be excluded as irrelevant, and the objection is rather to the relevancy of the evidence, than to the competency of the witness.

In *The Mayor of New York v. Price*, 4 Sandf. 616, 9 L. O. 255, 1 C. R. (N. S.) 85, the court adopted the same principle, in holding that obligees, under a joint and several bond, might be examined as witnesses for each other, inasmuch as, under sec. 136, a several judgment might be taken as against any one of them. The same question will be found fully examined in *The People v. Cram*, 8 How. 151, in connection with the propriety of a several judgment being entered, under such circumstances, as was there directed.

In *The President of the Mechanics and Farmers' Bank v. Rider*, 5 How. 401, 1 C. R. (N. S.) 61, (an action on a joint promissory note, defended on the ground of usury,) the above conflicting doctrines were brought into full play; and that held in *Parsons v. Pierce*, was confirmed by a majority of the court. The following expressions are used by *Harris, J.*, in delivering the opinion of the majority: "This, then, I understand to be the intent and import of the 397th section of the Code—any party to any action may be examined as a witness on behalf of any

other party, but, when examined on behalf of a co-plaintiff, or co-defendant, his testimony is not to have the same general effect as other testimony in the cause, but is to be applicable only to the issue between the party on whose behalf he is examined, and the adverse party. Such a witness may be excluded on the ground of interest, but, as his testimony cannot affect the issue between him and the adverse party, this objection can only be sustained, when the party offered as a witness is not only interested in succeeding himself, but also in having the party, by whom he is offered, succeed also. In the ordinary action against joint contractors, like that before us, the witness has no such interest: on the contrary, if he has any interest at all, it is to increase the number of those who are to assist in the payment of the recovery."

"It has been said that the effect of this rule is to allow several defendants, by mutually becoming witnesses for each other, to exonerate each other from liability. There is much force in this consideration, but it goes only to the question of credibility; it cannot affect the competency of the witness." The learned judge, after laying down that such testimony ought, however, to be received with extreme caution, held, in conclusion, that the evidence of co-defendants, in that action, had been erroneously excluded on the circuit, and that such testimony "should have been received, and submitted to the jury, with particular instructions as to its legal effect, and proper cautions as to the weight to be attached to it;" and, this opinion being concurred in by *Watson, J.*, a new trial was accordingly ordered.

The above opinion was, however, dissented from by *Parker, J.*, as regards the circumstances of that peculiar case, though the general doctrine, that every defendant is a competent witness for a co-defendant, to prove any defence personal to that co-defendant, and in which the witness is not interested, as laid down by the same judge, in *Selkirk v. Waters*, before cited, is distinctly asserted. The ground of dissent was, that, in that case, the contract was a joint contract, on which no several judgment could properly be entered, and the defence a joint defence, going to the entire demand; and there seems to be irresistible force in that reasoning, as regards the particular defence there in question, inasmuch as usury, if proved, rendered the instrument sued on invalid and void as against all the parties, it appearing to have been jointly made and jointly discounted; and, therefore, each defendant examined, had a dis-

tinct and positive interest in establishing that defence, because, by doing so, he would exonerate, not merely his co-defendant, but himself also.

In *Holman v. Dorl*, 12 Barb. 336, 1 C. R. (N. S.) 331, a defendant in an action for a false warranty, was held to be a competent witness on behalf of his co-defendant. The words "interest in the event of the action," in sec. 398, do not mean, in this connection, "an interest in any event of the action, but an interest in the event, as respects the party who calls him as witness." It was considered that, in that case, the party examined could not be benefited by his co-defendant's discharge, but that, on the contrary, he might have an interest the other way, as, the greater the number of parties contributing to the payment of the judgment, the better for him. The witness was accordingly held to be competent, on the above, and also on the further ground, that the case was one in which a separate judgment might be rendered.

In *Ladue v. Van Vechten*, 8 Barb. 664, it was held that the competency or incompetency of parties to testify, will depend upon their relation to each other, by their contract, and not on that existing between them as parties to the same action. The test will be as to whether or not such parties may be sued severally. If so, their testimony will be competent, and they will not be disqualified by being joined as defendants. It was also considered that, whenever an action might be maintained without joining a party, his testimony might possibly be received. An unreported decision of *Blodget v. Morris*, to the same effect, is referred to, in the report.

It will be seen that the law as to the examination of parties is now distinctly laid down by section 397, as amended, in accordance with the general spirit of the cases above cited, overruling, on the one hand, *Munson v. Hagerman*, and the decisions of that class, and the peculiar views of the majority in the *Mechanics and Farmers' Bank v. Rider*, on the other.

Co-plaintiffs and co-defendants are now, as a general rule, examinable in all cases, but in no case can their testimony be taken where they are jointly interested, or jointly liable with the party who calls them. See also *Fort v. Gooding*, below cited. The test by which the admissibility of their evidence will henceforth be tried, will probably be the measure of relief sought by the plaintiff, and whether such relief be joint or se-

parate in its nature. If he seek separate relief, he seeks it subject to the disadvantage of the opposite parties being competent witnesses for each other. If he confine himself to the case upon the joint relief, they cannot testify on each other's behalf.

*Competency of Parties, generally considered.*—It was held in *Hollenbeck v. Van Valkenburgh*, 5 How. 281, 1 C. R. (N. S.) 33, that a defendant, in the same interest as the plaintiff, could not testify on his behalf. The disqualification on the ground of interest extends to such a case, as he is “a party to the action,” (sec. 399,) though not, technically speaking, an adverse party. A person who is generally incompetent to testify, may, however, give evidence on points which he has no interest in establishing. The *onus probandi* in cases of objection to testimony of this description, lies upon the objector.

A plaintiff is, it seems, a competent witness to prove the loss or destruction of an instrument sued on, but his affidavit to that effect cannot be received. *McMullin v. Grannis*, 10 L. O. 57.

The testimony of a party to the suit, between whom and the plaintiff there was no issue, and who had accordingly put in no answer, was decided in *Leach v. Kelsey*, 7 Barb. 466, to be admissible, as against his co-defendants. This seems clear: the great doubt has been whether he could testify for them, though this also seems to be the case. See *Robinson v. Frost*, 14 Barb. 536, *supra*.

A party cannot be examined on his own behalf, to prove that he made a contract on which he is sued, as agent and not as principal. *Doughty v. Busteed*, 3 C. R. 187. “It is sufficient for us to say,” observes the learned judge, “that we know of no change in the individual, because he has different characters; he is the same person still, and has no right to be a witness in all the characters he sees fit to assume.”

A defendant may testify, however, to prove that he made a purchase on behalf of his co-defendant, and not on his own account. *Gilbert v. Averill*, 15 Barb. 20.

A witness, otherwise incompetent, cannot be made the reverse by the mere fact of being a party to the record.

Thus, in *Pillow v. Bushnell*, 4 How. 9, 2 C. R. 19, it was held that in an action by husband and wife, the defendant cannot require the wife to testify as a witness. “I think it is clear,”



the learned judge said, "that the object of this statute was simply to remove the technical objection that previously existed, under which a person could not be compelled to testify, because he was a party to the record," and that that was the only disqualification, intended to be removed. This can no longer be objected; "but, if there be any other disqualification, it is not removed by the statute." "If," it is said in a subsequent part of the opinion, "the statute is to be construed as making every party a competent witness on the call of the adverse party, then it would remove the disqualification of several classes of persons, now incompetent, such as insane persons, idiots, children who do not understand the moral obligation of an oath, and others. This could never have been intended." A motion for a new trial was therefore granted, on the ground that the court had erred in receiving the wife as a witness.

The same doctrine is maintained in *Erwin v. Smaller*, 2 Sandf. 340, and *Hasbrouck v. Vandervoort*, 4 Sandf. 596, 9 L. O. 249, 1 C. R. (N. S.) 81, affirmed by the Court of Appeals, 31st December, 1853. In the latter, the whole law upon the subject is fully gone into, and is summed up by *Duer, J.*, at the close of an able and elaborate opinion, as follows: "The law which has prevailed in this State, and to which we feel ourselves bound to adhere," is, "That husbands and wives are not competent witnesses for or against each other, in any suit in which either is a party, or in which either has a direct or certain interest." The point may, therefore, be now looked upon as settled. As to the extent to which the testimony of the wife may, or may not be admissible in criminal cases, see *The People v. Carpenter*, 9 Barb. 580. In *Arbogast v. Arbogast*, 9 How. 297, the wife was held, on similar principles, to be an incompetent witness to prove the plaintiff's case, for a divorce against her, on the ground of adultery.

In a suit concerning the wife's separate property, however, the above disqualification does not exist, and the husband will be a competent witness. *Willis v. Underhill*, 6 How. 396; *Hastings v. McKinley*, Court of Appeals, 7th October, 1853.

In *Dobson v. Racey*, Court of Appeals, 12th April, 1853, the widow of a deceased mortgagee in possession, and who, pending the suit, had released her interest to her children, was held to be a competent witness on their behalf, in a suit for redemption by the heirs of the mortgagor, to show that the latter had released his equity during his life; nor did her liability to

account for rents received by her, avail to exclude her testimony, because she was equally bound to do so to either party.

In *Armstrong v. McDonald*, 10 Barb. 300, it was held that the father and mother of a minor, the former being plaintiff, were not competent witnesses to prove the legitimacy of the latter.

In *Fort v. Gooding*, 9 Barb. 371, the evidence of a co-executor was held to be inadmissible, on behalf of co-defendants in the same capacity. In such a case, "all the defendants only represent the testator; no one of them is liable to the plaintiff unless all are, and no evidence can be given in the case, which can operate for or against one of them, and not the others. The Code cannot apply to a case, where a co-defendant cannot give any evidence but that which must of necessity operate in his own favor, as well as in favor of his co-defendants."

Where a party is called as a witness on the part of his adversary, he become *ipso facto* competent to testify on his own behalf. See this subject considered, and various cases cited, in the preceding chapter, and also in the succeeding portions of the present.

In a case where A and B were alleged to be joint contractors, and A, being examined by the plaintiff, swore to such being the fact, it was held to be competent for B to give evidence on his own behalf, for the purpose of contradicting A. *Comstock v. Doe*, 2 C. R. 140.

The examination of a defendant in tort, not served with process, does not, however, authorize the plaintiff to offer himself as a witness. The former is not a party until actual service, and is, therefore, a competent witness for either side. *Robinson v. Frost*, 14 Barb. 536.

The testimony of a party, called as a witness at the trial, may be contradicted by other witnesses. Sec. 393 gives sufficient authority for that purpose. *Armstrong v. Clark*, 2 C. R. 143.

If a party, directly interested in favor of one, is called and examined by the other of the parties to the suit, the objection to his competency is thereby waived, and he becomes *ipso facto* a general witness. *Combs v. Buteman*, 10 Barb. 573.

### § 194. Evidence of Witnesses.

*General Considerations.*—The cases above cited have reference to the question of the admissibility of the evidence of parties,

considered as such. Those following are more peculiarly applicable to testimony in general, though, in some instances, also bearing upon the former subject.

To a certain degree, however, a portion of this subject has necessarily been anticipated under the preceding, many of the questions as to interest in the result, which go to affect the competency of a certain class of witnesses, being also of peculiar application, with reference to the evidence of parties, where admissible.

The grand criterion of admissibility or non-admissibility, is interest in the result of the action. To exclude the testimony of a witness, as such, that interest must be direct and immediate. The action must be prosecuted for his immediate benefit, or he must be a party to it. If his interest in the event is not classifiable under one of these two heads, his testimony must be admitted, however strong, in other respects, his stake in the result, or his bias in the matter may be. Of course, this only applies to the admissibility of his evidence, as evidence. It does not deprive the adverse party of the right to comment upon, or to rebut it, when given, either directly, by adverse testimony, or, indirectly, by proving the bias under which it was given.

It would be needless to cite in detail, a second time, the cases in the preceding section, in which interest in the result has entered directly into the question of the competency of the evidence of parties, beyond a mere cursory reference to them, as below. The grand criterion as to the propriety or non-propriety of a several judgment, on which the former question mainly hinges, is of course referable to the criterion of a controlling interest in the result, or the reverse. The radical principle is the same, whether applied to a party to the record, or to a person not technically standing in that position. No one can testify directly in his own behalf, or in support of his own direct interest. In support of the interests of others, severable from his own, his testimony is competent, and this, whether to the whole issue, or to collateral circumstances; his power to testify in the latter case, being confined to those limits, within which his direct interest does not come into play.

The test of total interest in the result will be found specially applied, as above, in *Henry v. Henry*, *Dodge v. Averill*, *Labar v. Koplín*, *Selkirk v. Waters*, *Mechanics and Farmers' Bank v. Rider*,

*Holman v. Dord*, *Ladue v. Van Vechten*, and the cases with reference to the relation of husband and wife, and parent and child. That of partial interest, in *Parsons v. Pierce*, *Selkirk v. Waters*, and *Hollenbeck v. Van Valkenburgh*, also below cited.

*Test of Interest, as applied to Witness.*]—In *Fitch v. Bates*, 11 Barb. 471, the test of interest in the result, which will, or will not exclude the testimony of a witness, is laid down as follows: Under the Code, if the result of a cause will directly and immediately affect any right or interest of a person proposed as a witness, and adversely, if against the party calling him, he is inadmissible. As, where the judgment *per se* must necessarily create or take away a right, or enlarge or diminish a fund, in which he has a direct interest, or vest in him, or divest him of an estate. But, if the record only furnishes evidence for or against him, and the effect of the recovery is not direct and immediate, then the objection goes to his credit.

### *Special Cases.*

*Attorneys Agents, &c.*]—An attorney transacting business in the ordinary form, is a competent witness; *Little v. Keon*, 1 C. R. 4; but, in a case in which his compensation is, by agreement, to depend upon the result of the action, it would seem he is not so.

Agents who had executed a written contract in their own names, were held to be competent witnesses for the plaintiff, in an action against their principal, under the Code as now amended, although the necessary effect of their testimony would be to charge the defendants, and discharge themselves, interest in the matter being no longer a ground of exclusion. *Stewart v. Fenly*, 5 Sandf. 101, 10 L. O. 40. See, likewise, as to the power of an agent to disprove his own liability, by fixing it on his co-defendant, as principal, *Gilbert v. Averill*, 15 Barb. 20, before cited.

*Vendor and Purchaser.*]—A purchaser under contract is incompetent to give evidence in support of his vendor's title, in an ejectment against the latter. *Stafford v. Williams*, 12 Barb. 240.

The grantor of the realty is not, however, disqualified in an action for future rents of the premises granted, nor will his evi-

dence entitle the adverse party to give testimony in his own behalf. *Van Wicklen v. Paulson*, 14 Barb. 654.

*Promissory Note—Partnership, &c.*]—Where an action on a promissory note was defended, on the ground of a fraudulent transfer to the plaintiff, and the alleged owner had given notice to the defendants not to pay, and indemnified them, it was held that such alleged owner was nevertheless a competent witness. "It would have been necessary," the judge said, "for the defendant to contest the suit, if Eames"—the alleged owner—"had not indemnified him. He is, therefore, the real as well as nominal defendant, and the indemnity does not substitute Eames as the party in interest, to the exclusion of the defendant. Eames is unquestionably interested, but that does not disqualify him, under our new law." *Farmers' and Mechanics' Bank v. Paddock*, 1 C. R. 81.

In *James v. Chalmers*, 1 C. R. (N. S.) 413, it was held that a former holder of a promissory note, who had transferred it without recourse or guaranty, was a competent witness for the plaintiff; but that the declarations of such former holder, made while he stood in that character, were not competent evidence against the then owner, to whom it had been transferred in good faith.

In *Niess v. Mercer*, 15 Barb. 318, a joint endorser, and the maker of a promissory note, loaned by the latter to a third party, who had wrongfully negotiated it, and converted the proceeds to his own use, in consequence of which, the other endorser had been compelled to pay the amount, were both held to be competent witnesses for the latter, in an action brought by him, against the party who had been guilty of that conversion.

The decision is grounded on the view that the action was not prosecuted for their immediate benefit, upon a just construction of the first clause of section 399.

In *Bump v. Van Orsdale*, 11 Barb. 634, an intermediate transferee of a note payable to bearer, was held to be a competent witness for the plaintiff, in an action brought by the last holder. The allowing a judgment to be taken by default against him, will not render a party to a joint and several promissory note, a competent witness for his co-defendants, on a subsequent trial between them and the plaintiff. *Austin v. Fuller*, 12 Barb. 360. A similar view is taken in *Rich v. Husson*, 4 Sandf. 115, where

it was held that one of two co-partners, sued for an alleged co-partnership debt, who had given his note for that debt, was not a competent witness for the plaintiff, though he had suffered a default. He was interested, in favor of the plaintiff against the defendant.

In *Bean v. Canning*, 10 L. O. 248, a partner in a dissolved firm, was held a competent witness for his former partners, in an action against them. Immediate benefit is the criterion in these cases, not a mere interest in the result.

*Insolvents, Bankrupts, &c.*—In *Fitch v. Bates*, 11 Barb. 471, it was held that the assignor of property for the benefit of creditors, cannot be a witness for his assignees, in a suit brought by them, for the recovery of a part of that property. He is interested in the result.

An insolvent has been decided, in a county court, to have an immediate benefit in the result of an action brought by his trustees, and must, therefore, be excluded as a witness therein, though it did not appear that any surplus was coming to him. "It is beneficial to him to have his debts paid; and whatever is subtracted from the hands of his assignees, leaves that amount, for which his future effects are liable." *Hoffman v. Stephens*, 2 C. R. 16. See, however, the case of *Davies v. Crabtree*, cited in a note, 2 Sandf. 690, directly opposed to this decision. In *Davies v. Cram*, 4 Sandf. 355, it is also held, that an insolvent, who has assigned his property, is a competent witness, in an action brought by his assignees, for the benefit of the estate. Such a suit is not prosecuted for his *immediate* benefit, within the meaning of the Code. His interest, if any, in the surplus of his estate, is remote and contingent.

A like view is taken in *Morse v. Cloyes*, 11 Barb. 100, where it is held, that a bankrupt, after his discharge, is a competent witness for his sureties, in a proceeding to avoid their joint note, on the ground of usury. To exclude the bankrupt in such a case, it must be shown that there will be a surplus of his estate, to which he is entitled. That surplus, and a consequent interest in the witness, will not be presumed.

If, however, it be made to appear that any surplus, however small, will arise, a witness, under these circumstances, is clearly incompetent. It has been also held by the Court of Appeals, that a discharged bankrupt, who has not released his interest

in the surplus of his effects, is not a competent witness, in a suit instituted by his sureties, to avoid a joint debt against the estate. *Morse v. Crofoot*, 4 Comst. 114.

There is, as will be seen, considerable discrepancy in the above cases. The last cited is, of course, the dominant authority, so far as the principles there laid down extend. The real test seems to be, the probability of a surplus or the reverse; if there appear any chance of the insolvent or bankrupt deriving any benefit, however small, on the ultimate winding up of his affairs, the fact that such benefit is remote, and even uncertain, will not, it would seem, affect the question of his admissibility. He has *some* direct and personal interest in the event of the action, and it is for his immediate benefit, that that interest should be ascertained and provided for, however remote its ultimate realization may be. Where, on the contrary, the estate is hopelessly and irredeemably insolvent, without the chance of a surplus, it seems that the doctrine held by the Superior Court, and in *Morse v. Cloyes*, may fairly prevail, to most, at least, if not to the total extent, in which it is there laid down.

It is likewise held in *Davies v. Cram*, above referred to, that, as a general rule, a creditor of the insolvent debtor is also a competent witness, though it is possible there may be some exceptions, as where there is but a single creditor, who would be entitled to the whole proceeds of the recovery, and where the subject-matter in controversy involves the whole of the assigned estate. The objection goes to the credibility of the witness, rather than to his competency. It is true he has an interest in the result, but he has not such an immediate benefit as to disqualify him. The case seems to present several features of analogy with those next considered.

*Stockholders, Corporators, &c.*—A stockholder in a bank was held not to be a competent witness, in an action brought by that bank against a third party. As a member of the corporation, he was a person for whose benefit it was prosecuted. *The President of the Bank of Ithaca v. Bean*, 7 L. O. 225; 1 C. R. 133. The witness in that case was the president himself, and, therefore, by name, a party to the action; but the decision is not grounded on this fact, but on the doctrine, as there held, in relation to stockholders in general.

In *The Washington Bank of Westerly v. Palmer*, however, 2 Sandf. 686, 8 L. O. 92, a directly contrary opinion to that in the last case was pronounced. It was there held that a stockholder is neither a party to the suit, nor a person for whose immediate benefit it was prosecuted, and the case last cited is expressly referred to, and dissented from. See also Note, 2 Sandf. p. 690, where it is stated to have been decided, that the assignor, in a voluntary general assignment for the benefit of creditors, was a competent witness in a suit brought by his assignees, overruling *Hoffman v. Stephens*, before cited.

The principles laid down in *The Washington Bank of Westerly v. Palmer*, as above, were still further extended in *The Bank of Charleston v. Emeric*, 2 Sandf. 718, where a co-defendant, primarily liable for the debt claimed, was decided to be a competent witness. The court, in pronouncing their opinion, state as follows: "That section [399] applies only to a person, into whose hands the money collected in the suit will necessarily go, when it is received, or who might take it from the sheriff or the attorney, as his own. It does not apply, where the money cannot immediately, though it may ultimately, go into his hands, as in the case of a stockholder, in a suit brought by a corporation:" and, in *The New York and Erie Railroad Company v. Cook*, 2 Sandf. 732, an objection having been taken to the testimony of a stockholder, *Oakley, C. J.*, in delivering the judgment of the court, at general term, said: "We have no doubt that Mr. Ketchum"—whose testimony was objected to on the above ground—"was a competent witness, under the recent provisions of law on the subject."

The point has since been effectually settled, and the doctrine established, that a stockholder or corporator, as such, is not a party for whose immediate benefit the suit is prosecuted or defended, and that he is, therefore, under the Code, a competent witness for the corporation; by the subsequent cases of *The Bank of Leasingburgh v. McKie*, 7 How. 360; *Conro v. Port Henry Iron Company*, 12 Barb. 27, (p. 61;) and *Montgomery County Bank v. Marsh*, 11 Barb. 645; affirmed by the Court of Appeals, 30th December, 1852. See, likewise, *Hamilton and Deansville Plank Road Company v. Rice*, 3 How. 401, 1 C. R. 108, 7 L. O. 139, 7 Barb. 157.

In *Pack v. The Mayor, &c., of New York*, 3 Comst. 489, it was decided by the Court of Appeals, that an alderman of the city of



New York was a competent witness, in an action on the case, against the Mayor, Aldermen, and Commonalty of that city, in their corporate capacity; reversing a decision of the Court of Common Pleas, by which his testimony had been rejected. The view taken was, that the action was not brought against the individuals composing that corporation, but against the corporation itself, as a legal entity created by the charter. If otherwise, no inhabitant of the city would be competent to testify. The evidence was decided to be admissible, both under the Code, and under the Common Law.

*Sureties.*.]—In a note at 3 C. R. 24, it is stated to have been decided by *Oakley*, C. J., that, in an action brought by trustees on an attachment under the Revised Statutes, the attaching creditor is not a competent witness, on the ground that he is a person, for whose immediate benefit the action is prosecuted.

This conclusion is supported by *Mitchell v. Weed*, 6 How. 128, 1 C. R. (N. S.) 196, where it was held, that, when such an attachment had been discharged on the defendant's bond, the latter was not a competent witness in an action against his sureties, and could not be made so, by a release from the defendants. *Thompson v. Dickerson*, 12 Barb. 108, 1 C. R. (N. S.) 213, is authority to the same effect.

In *Catlin v. Hansen*, 1 Duer, 309, it was held that a witness who, for a valid consideration, had agreed to indemnify the defendant by whom he is called, is incompetent, under the Code, as a person for whose immediate benefit the action is defended; the general question being there fully discussed, in the opinions of the judges, delivered *seriatim*.

The correctness of this view is established by the Court of Appeals, in *Howland v. Willett*, 31st December, 1853, which holds that a party who has indemnified the sheriff, for taking property, by virtue of an execution, is not a competent witness for the latter, in a suit founded on such taking. He is a person for whose immediate benefit the suit is defended.

*Executors, Legatees, &c.*.]—The evidence of a co-executor is inadmissible, on behalf of defendants standing in the same capacity; they are essentially in the same interest. See *Fort v. Gooding*, 9 Barb. 371, above cited. In *Mesick v. Mesick*, 7 Barb. 120, the evidence of an unpaid legatee, who had appeared by

counsel, and contested the executors' accounts, in proceedings before the surrogate, was held to be incompetent, though, at the time his evidence was tendered, he had assigned his legacy. The evidence, however, of a legatee, who has been paid his legacy, and given a receipt to the executors, is admissible. *Mesick v. Mesick*, above cited. The same was held with reference to the testimony of a residuary legatee, in an action for work and labor, brought against the estate; *Weston v. Hatch*, 6 How. 443; and likewise, as to the widow of an intestate, in a similar proceeding; *Megary v. Funtis*, 5 Sandf. 376. Neither were entitled to an immediate benefit, sufficient to work their disqualification.

*Assignor of Chose in Action.*]—It will be observed, that sec. 399, as now amended, makes express provision for the examination of a party standing in this capacity, concerning which, the Codes of 1848 and 1849 were silent, in relation to the mode of examination, and the notice requisite to be given. In order to enable the examination of a party standing in this capacity, on behalf of the party deriving title through him, a peculiar form of proceeding is necessary, under s. 399, as above cited. A previous notice, in writing, of, at least, ten days, specifying the points on which such assignor is intended to be examined, must be served, in all cases, or his testimony cannot be taken. See form of notice in Appendix. Another prerequisite is essential, viz.: that the other party to the original contract, whom the adverse party in the action represents, must be living, and his testimony in opposition must be procurable; if not, the evidence will be wholly inadmissible. The remedy, therefore, is one, in adopting which, the greatest exactness in practice will be requisite, in complying with the safeguards to the adverse party, imposed as above, in view of its delicacy and importance.

The provision as to the ten days' notice to be given as above, must be strictly complied with, and the points on which the assignor is to be examined, distinctly specified, or the evidence will be excluded. *Fulton v. Keese*, 8 How. 341; *Knickerbacker v. Aldrich*, 7 How. 1. In *Warren v. Helmer*, 8 How. 419, it was considered that this provision was not "a rule of evidence," and therefore not applicable to suits in justices' courts. It seems more than doubtful, whether it will be expedient to rely implicitly on this last decision, for the present, at all events.

Under the Code of 1849, it was provided by sec. 399, that sec. 398 should not apply to the case of an assignor of a thing in action, assigned for the purpose of making him a witness. At first sight, this provision, as it then stood, seemed to exclude, altogether, the evidence of a person standing in that capacity. It was held, however, under that section, that the evidence of a stockholder, who had assigned his stock over to another party, so as to retain no interest in it, was receivable, at all events, even though such assignment had been made for the express purpose of making him a witness. *Hamilton and Deansville Plank Road Company v. Rice*, 3 How. 401; 1 C. R. 108; 7 L. O. 139; 7 Barb. 157. Sec. 399 does not declare, that the assignor of a chose in action shall be incompetent, but that sec. 398 shall not apply to him. "The conclusion is, therefore, that, if the assignor, who has assigned to become a witness, still remains interested in the event of the suit, he shall continue to be incompetent, notwithstanding the provisions of the 398th section. If that section should be applied to such an assignor, he might be a witness, though he remained interested in the event of a suit, as in many cases he does, notwithstanding the assignment. The Code intended to exclude such assignors, if interested; though interest, as a general rule, would not render a witness incompetent. Such an assignor, if divested of his legal interest, would have been competent, under the old law; and it is the policy of the Code to *enlarge, and not contract*, the rule of competency, as applied to witnesses."

A similar doctrine to that in the case last cited, was acted upon in *Everts v. Palmer*, 3 C. R. 51, 7 Barb. 178, where the holder of a note had exchanged it for the note of another party, who then sued upon it; under which circumstances, the original holder was declared to be a good witness, though his testimony to that effect appeared to be open to some suspicion as to the existence of a secret understanding.

The case of such an assignor is now expressly provided for by statute, as above cited. The principle, however, that a party standing in such a capacity will be equally disqualified, unless the assignment made by him is clear and unconditional, remains, without doubt, unshaken. If he retains, directly or indirectly, such an interest in the result of the action, as will bring him within the definition of a person for whose immediate benefit the suit is prosecuted or defended, his testimony will clearly

be as open to objection, as that of any other party, standing in the same position. See this principle fully developed in the previous portion of this section, and in several of the cases, and especially in *Fitch v. Bates*, and *Morse v. Crofoot*, there cited. The right of the adverse party to have his testimony secured in all cases, where a demand is transferred, merely for the purpose of making the assignor a witness to prove it, is clearly recognized in *Willis v. Underhill*, 6 How. 396.

In *Bump v. Van Orsdale*, 11 Barb. 634, it was held, in analogy to the foregoing provisions, that the transfer of a promissory note by delivery, operated as an assignment, sufficient to bring an intermediate transferee within the scope of these provisions, and to entitle the defendant to offer his own evidence, where a party, standing in that capacity, had been examined on behalf of the plaintiffs. In *Van Wicklen v. Paulson*, 14 Barb. 654, the grantor of land was held not to be an assignor of a chose in action, with reference to rents, not due at the time of the grant. His testimony is, therefore, that of an ordinary witness, in a subsequent action by the purchaser, and will not entitle the adverse party to offer himself as evidence.

In *Harris v. Bennett*, 6 How. 220, 1 C. R. (N. S.) 203, the court refused to allow the assignee of the plaintiff's interest to be substituted as plaintiff, under sec. 121, unless upon the terms that the then plaintiff should not be examined as a witness, it being evident that the assignment was made for that purpose only.

*General Remarks as to Competency of Witnesses.*]—The objection to the competency of a witness, on the ground of interest, must be taken at the proper time, or it will be considered as waived; *Leach v. Kelsey*, 7 Barb. 466; where the general term refused to entertain such an objection, the question not having been raised before the referee. See likewise *Combs v. Bateman*, 10 Barb. 573, to the same effect.

In *Hollenbeck v. Van Valkenburgh*, 5 How. 281, 1 C. R. (N. S.) 33, it was held, that the disqualification of sec. 399 extended equally to the case of an adverse party, as to that of one called on his own behalf, if he is interested in the event of the action. He can, however, be examined on formal points, in which he has no interest. In all cases of objections of this nature, the burden of proof rests on the party making them. "Every

person is competent to be sworn as a witness, unless his disqualification is affirmatively shown."

In *Morss v. Morss*, 11 Barb. 510, 1 C. R. (N. S.) 374, 10 L. O. 151, it was held, that one of three referees of the cause, was not a competent witness, on the trial before himself and his colleagues; the various authorities in analogy to that subject, and in relation to the evident incompetency of judges, and the possible competency of jurors, to give evidence on questions before them, being fully reviewed and considered.

## BOOK IX.

OF TRIAL, AND CONSEQUENT PROCEEDINGS BEFORE  
ENTRY OF JUDGMENT.

## CHAPTER I.

## OF TRIAL—GENERALLY CONSIDERED.

§ 195. *General Incidents of Trial.*

THE mode of joinder of issue, and the preparations for bringing the cause forward for adjudication, having thus been considered, the next subject is the actual trial of that issue, whether of law or of fact.

*Statutory Definition, &c.*—The following definition of trial is given by sec. 252 of the Code, as last amended :

§ 252. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

In the Code of 1851 this definition was omitted ; but it is now restored, as it stood in the measure of 1849. A similar restoration has taken place with reference to the trial of issues of law, which, by the Code of 1851, was taken from the single judge, and given to the general term, unless by special direction of the court. The inconveniences of this change were so obvious, that the Supreme Court of the First District, and the New York Common Pleas, both abrogated it, in effect, by special rules, amounting to a continuance of the previous practice ; and the Legislature has now reëdopted the same view.

*Issues joined, how triable.*—The following are the provisions

of the Code, as contained in secs. 253 to 255, inclusive, defining the instances to which trial by jury, or trial by the court, are respectively peculiarly applicable:

§ 253. An issue of law must be tried by the court, unless it be referred, as provided in sections two hundred and seventy and two hundred and seventy-one. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section two hundred and sixty-six, or a reference be ordered, as provided in sections two hundred and seventy and two hundred and seventy-one.

§ 254. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it, as provided in sections 270 and 271.

§ 255. All issues of fact, triable by a jury or by the court, must be tried before a single judge. Issues of fact, in the Supreme Court, must be tried at a Circuit Court, when the trial is by jury; otherwise, at a Circuit Court or special term, as the court may by its rules prescribe. Issues of law must be tried at a Circuit Court or a special term, and shall, unless the court otherwise direct, have preference on the calendar.

Certain descriptions of cases must, as above provided, be tried by a jury, unless such trial be waived; but every other issue is made "triable" by the court. The exact force of this word, "triable," and whether it imports a necessity or an option, has been doubted.

In *Wood v. Harrison*, 2 Sandf. 665, a controversy, strictly equitable in its nature, was tried by a jury, on issues specially prepared by the judge, and submitted to them for their decision; but the general tendency of the decided cases unquestionably runs in favor of all controversies of an equitable nature being tried by the court alone, without a jury. The practical impossibility of complicated equitable questions being adequately dealt with by the latter, is well demonstrated in *Wooden v. Waffle*, 6 How. 145, 1 C. R. (N. S.) 392.

Under the recent amendments in sec. 258, "a separate trial between the plaintiff and any of several defendants, may now be allowed by the court, whenever, in its opinion, justice will be thereby promoted." The limits of this newly-given authority remain to be settled by judicial construction. Numerous

cases might be adduced, in which its exercise is likely to be beneficial.

*Issue of Law.*.]—The issue of law is, from its very nature, triable by the court alone, without the intervention of a jury. See sec. 252. It may, however, be referred, by consent, under sec. 270. The provision in sec. 252 runs, that it may be referred, as provided by secs. 270 and 271; but this is a manifest error of the Legislature, the latter section being totally inapplicable to such cases.

*Mixed Issues.*.]—In reference to mixed issues, those, *i. e.*, where a demurrable objection has been raised by answer, owing to the necessity of statements of fact to make that objection apparent, a question has been raised in *The Farmers' Loan and Trust Company v. Hunt*, 1 C. R. (N. S.) 1, as to whether such issues may not properly be looked upon in the light of issues of law, even when the facts in question are controverted, so far as to entitle the parties to bring them to an early decision, without waiting for the trial of the issues of fact; and a reference, according to the old chancery practice, was suggested by the court, as a means of overcoming the difficulty. The case having, however, gone off upon another point, that in question was not directly passed upon, and there seems reason to doubt the soundness of the conclusion. The two issues of law and of fact, respectively, seem, under such circumstances, to be mutually dependent upon each other, and inseparable in their consideration. If, however, the facts on which the objection is grounded be, on the contrary, admitted, either directly or by non-denial, it might then well be contended, that, by such admission, a pure issue of law has been practically raised, and should be tried accordingly.

The provision in sec. 251, that where issues both of law and of fact are joined by the same pleading, the former must be first tried, unless the court shall otherwise direct, seems clearly inapplicable to this peculiar description of trial. It refers to those cases in which the issues so joined are severable, and not dependent, the one upon the other, as in this peculiar form. See this subject heretofore considered, and cases cited, under the head of Issue.

*Issues of Fact.*.]—We now proceed to the trial of the issue of



fact, either pure or mixed, for which three modes are open. Such issue may be tried,

1. By a jury.

2. By the court.

3. By referees: which modes of trial will be considered *seriatim*. The trial by referees, unless such reference be made by consent, is only applicable to those cases in which the examination of a long account is involved. See Code, sec. 270. Trial by the court, or by a jury, are the courses more usual in practice.

Of these, trial by jury may be said to form the rule, and trial by the court the exception, except in cases heretofore cognizable in equity, in which, the reverse of this rule holds good. Trial by jury, may, however, be waived, by consent of the parties, or by failure to appear. See sec. 266.

*General Remark.*—The peculiar incidents of each of these several forms of trial will be considered, each under its proper head, in the succeeding chapters. There are, however, several considerations applicable to trial in general, without reference to the peculiar form in which it is conducted, and which will be treated in the succeeding portions of the present chapter. \*

## § 196. *Amendment or Disregard of Formal Objections.*

*Statutory Provisions.*—The first subject in which the Code makes any definite alteration, in relation to the conduct of a trial, is with reference to amendments on points of form, during its progress. The enactments on this subject are contained in sections 169, 170, 171, and 176, forming a portion of the chapter as to amendments in pleading, though clearly referable to amendments upon the trial, and to those alone. These provisions run as follows:

§ 169. No variance between the allegation in a pleading and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

§ 170. Where the variance is not material, as provided in the last

section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§ 171. Where, however, the allegation of the cause of action or defence, to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

§ 176. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

These provisions are, as will be seen, equally applicable to every species of trial, whether by a jury or otherwise, and the latter of them extends to all proceedings whatever, whether at that or any other stage of the action. The present, however, appears to be the most convenient period for their consideration, and for the citation of the recent cases thereon.

By the Revised Statutes, title V., chap. VII. of part III., 2 R. S. 424 to 426, extensive powers of amendment under similar circumstances, had already been given, and those powers appear to be still subsisting, in concurrence with those of the Code. See, to this effect, in *Brown v. Babcock*, 1 C. R. 66; 3 How. 305.

Section 176 was held to have no retrospective effect, and to be confined solely to pleadings and proceedings under the Code, in *Deifendorf v. Elwood*, 3 How. 285; 1 C. R. 42; and *Denniston v. Mudge*, 4 Barb. 243. These decisions have reference, however, to proceedings prior to the amendment of 1851, and to them only; sec. 459, as altered on that amendment, renders these provisions retrospective in all cases. See *Pearsoll v. Frazer*, 14 Barb. 564.

[*General Considerations.*]—The consideration of this subject may be divided into two principal heads, viz.:

1. When an objection to the pleadings will or will not be disregarded at the trial, involving the consideration as to what will, or will not constitute a fatal variance.

2. When an amendment will be directed, and whether *nunc pro tunc*, or by way of postponement of immediate proceedings.

In both cases, the adverse party must show, affirmatively, that he has been actually misled to his prejudice, or his objection, though admissible, cannot be maintained; and, where he

seeks to prevent the trial from proceeding, under the effect of an amendment "*nunc pro tunc*," he must show, in addition, that the amendment, if granted to his adversary, will involve the necessity of more mature consideration, or the adduction of further evidence on his part, to prevent a failure of justice.

The general powers of the court in relation to these provisions are thus broadly stated in *Corning v. Corning*, 1 C. R. (N. S.) 351, affirmed by the Court of Appeals, 2 Seld. 97: "The Code has made important changes in the system of *nisi prius* trials. Under the new system, the judge at circuit possesses the same control over the pleadings, formerly exercised by the Supreme Court, after verdict, and before judgment. The pleadings may now, on the trial, be conformed to the proof—immaterial allegations disregarded, immaterial evidence rejected, and such judgment may be directed as the facts and the law of the case require." See, also, general principles, as laid down in *Fay v. Grimstead*, below cited.

*Disregard of Objections—What will or will not constitute a fatal Variance.*—In *Pearsall v. Frazer*, 14 Barb. 564, a mere formal defect in the pleading was disregarded by the court, under sec. 176.

In *Fox v. Hunt*, 8 How. 12, it is laid down to be the correct practice on the circuit, to lay out of the case all irrelevant allegations, or immaterial issues, and to hold the parties to trial on such as are left.

In *Harmony v. Bingham*, 1 Duer, 209, relief was granted under the foregoing section, and the decision of a referee, disregarding sundry immaterial variances, between the pleadings and the proof, was sustained.

In *De Peyster v. Wheeler*, 1 Sandf. 719, 1 C. R. 93, it was held that variances, not affecting the merits, which do not surprise the adverse party, and on which he ought not, in good faith, to have relied, will be disregarded on arguments at bar, without directing any amendment. If, however, the prevailing party deem an amendment prudent, he may apply for leave, by motion, after the argument, when the court will allow it, on such terms as may be just. It was further held, that, upon the trial of the cause, the court may, in their discretion, either order amendments in like manner, or may disregard the variance.

Where, however, the defect is one involving an insufficient

statement of facts, the court will not disregard the objection, but will direct an amendment; *Vanderpool v. Tarbox*, 7 L. O. 150; in which case, an amendment of that nature was allowed without costs, the defect being merely of a technical description.

In relation to sec. 171, it was held, in *Diefendorf v. Gage*, 7 Barb. 18, that, under an answer averring that property in question in the cause "was very poor, and of little value," proof could not be received, that such property was "worth nothing, and of no value."

In *Hawkins v. Appleby*, 2 Sandf. 421, a less strict view was taken; and the declaration, in that case, having averred representations by the defendant, that a note there in question was "a good note, and would pass in South street," proof that he said "the note was good, and there were people in South street who would take it," was held not to be a substantial variance.

Objections, otherwise sustainable, may become untenable by express waiver. Thus, in *Morse v. Cloyes*, 11 Barb. 100, the settlement of interrogatories by consent, was held to preclude both parties from taking formal objections thereto, on the trial of the cause. So, likewise, as to an omission to take a demurrable objection, *Ingraham v. Baldwin*, 12 Barb. 9.

In *Mann v. Morewood*, 5 Sandf. 557, evidence of the alleged satisfaction of a debt by the delivery of stock, was held not to be receivable, in support of a simple allegation of over-payment, without specifying any particulars, and the complaint was dismissed accordingly.

In *Fay v. Grimstead*, 10 Barb. 321, evidence to show usury, was refused to be admitted, under insufficient allegations in the answer. In the same case, the following general principles are laid down, in reference to the course of proceeding under these sections: "A variance between the pleadings and the proof, sufficient to defeat the action or destroy the defence, must leave the case unproved in its entire scope and meaning. If left unproved in some particular or particulars, it is a subject for amendment, upon terms, if the adverse party has been misled by it; otherwise, amendments may be made at the time of the trial, and without any conditions whatever."

In *Gunter v. Cutlin*, 1 Duer, 253, 11 L. O. 201, the same conclusion is come to as in *Fay v. Grimstead*, with reference to the defence of usury, and it was held that, in these cases, the proof must correspond, in all respects, with the allegations in the an-

swer. If there is any variance, the defence must be overruled.

In *Marquat v. Marquat*, also, 7 How. 417, a strict view was taken by the majority of the court, as to the necessity of the proof in the case corresponding with the pleadings; and judgment given for the plaintiff, on an equitable view of the case as between him and the defendant, was reversed, on the ground that, though the former might be entitled to relief in another form of action, he had failed to sustain his case, on the issue, as actually joined between the parties. See, likewise, *Coan v. Osgood*, 15 Barb. 583, and *Catlin v. Hansen*, 1 Duer, 309.

It was held in *Diblee v. Mason*, 1 C. R. 37, 6 L. O. 363, that these provisions apply to pleadings only, and not to process, and that a mistake in the latter cannot be disregarded at the hearing, though the court may have power to direct an amendment, on motion.

*Amendments on Trial.*—This subject has been necessarily entered upon to some slight degree, in the preceding division of this section. See, as to amendment of process, *Diblee v. Mason*, last cited; as to an amendment being the proper course, when the defect complained of involves an insufficient statement of facts, *Vanderpool v. Tarbox*, 7 L. O. 150; and, as to the general principle that, where the defect complained of leaves the case unproved in some particulars, it will be a fitting subject for amendment upon terms, where the adverse party has been misled, but otherwise, where such has not been the case, *Fay v. Grimstead*, 10 Barb. 321. The subject has also been considered, to some slight extent, and in a collateral manner, in relation to amendments in pleading.

A material distinction must be drawn between amendments made at the actual trial, under the powers of the section last cited, and those made previously, on motion of the parties. The cause of action or ground of defence cannot properly be changed by an amendment made on the trial, for the purpose of conforming the pleading or proceeding to the facts proved, and, if allowed, such an amendment will be inoperative, and any judgment taken under it will be reversed. *Beardsley v. Stover*, 7 How. 294; *Marquat v. Marquat*, 7 How. 417; *Coan v. Osgood*, 15 Barb. 583; *Catlin v. Hansen*, 1 Duer, 309. Nor can such an amendment be granted, for the purpose of making the complaint conform to the verdict of a jury, for larger damages

than those claimed by the plaintiff, unless upon the condition of payment of costs, and granting a new trial. *Corning v. Corning*, 2 Seld. 97, 1 C. R. (N. S.) 351. Liberty was given, however, to the plaintiff in that case, to remit the excess of damages, in which case the verdict was to stand.

The above principle, in relation to amendments changing the cause of action or ground of defence, does not apply, however, to applications made before the trial, on motion. Under these circumstances, the power of the court to grant an amendment is practically unlimited, on good cause being shown why that facility should be afforded; provided, only, the actual claim on the one hand, or the actual defence on the other, remain substantially the same. Under these circumstances, however, the payment of costs will usually be imposed, as a condition. *Chapman v. Webb*, 6 How. 390, 1 C. R. (N. S.) 388; *Beardsley v. Stover*, 7 How. 294. See this subject heretofore considered, under the head of Amendments in Pleading.

In *Willis v. Underhill*, 6 How. 396, the appointment of a next friend for a feme covert, plaintiff, was held to be a fitting subject for an amendment, *nunc pro tunc*, at any stage of the suit.

Amendments have been allowed on the trial, under the following circumstances:

A mistake in the proper denomination of the plaintiffs, was allowed to be so corrected, in *Burnes v. Perine*, 9 Barb. 202.

Where the plaintiff sued two parties as jointly liable, but failed in proving the liability of one of them, he was allowed to amend, by striking out the name of such party, on condition of his forthwith paying, or giving security to him for his costs, and allowing the trial to stand over, if the other defendant desired. *Bemis v. Bronson*, 1 C. R. 27. In *Travis v. Tobias*, 8 How. 333, it was held that, as a general rule, an amendment of this latter nature should not be made *instantly*, on the trial. It rests, however, clearly in the discretion of the judge, with reference to the peculiar circumstances of each individual case. See too, *Fullerton v. Taylor*, 1 C. R. (N. S.) 411, 6 How. 259; *Downing v. Mann*, 9 How. 204.

In *Jackson v. Sanders*, 1 C. R. 27, permission was given to amend upon the trial, by substituting for a count upon two promissory notes, a count upon a special contract, under which such notes had been deposited, as a temporary security for an unfulfilled arrangement. The plaintiff, however, there refused to come to the terms imposed, and was nonsuited accordingly.

In the *Cayuga County Bank v. Warden*, 2 Seld. 19, an amendment, by striking out parts of the declaration, allowed by the judge upon the trial, without costs, was sustained by the Court of Appeals, as authorized by the Code, and resting in the discretion of the court.

Where the complaint, in slander, had omitted to allege the words complained of, to have been spoken "in the presence or hearing of some person," the court, at the trial, allowed the complaint to be amended in that respect, without costs, the defendant not having been thereby misled or injured. *Wood v. Gilchrist*, 1 C. R. 117.

Of course, amendments of the above description can, for the most part, be made, or be considered as having been made upon the spot. In some cases, however, it may be necessary to apply for a postponement of the trial for that purpose; and, even when the defect may have been disregarded by the court, it may sometimes be prudent to make the amendment subsequently, on special application, with a view to ulterior proceedings. See *De Peyster v. Wheeler*, above cited.

Where a defect, involving the question that the complaint might be true, and yet the plaintiff not entitled to recover, was first brought to light on the trial, the defendants having omitted to demur; the plaintiffs were allowed to amend, by inserting the necessary averments, on payment of the costs of the trial, the defendant to have twenty days' time to answer. *Executors of Keese & Lawrence v. Fullerton*, 1 C. R. 52.

In *Lettman v. Ritz*, 3 Sandf. 734, relief of this nature was granted, and the plaintiff was allowed to amend his complaint after verdict, the defect being, that the words complained of, in slander, had not been averred in the original language. This leave was, however, only given on terms, that he should reduce the amount of his verdict to a reasonable sum. See, as to this last point, *Diblin v. Murphy*, 3 Sandf. 19. An amendment, increasing the damages beyond the amount demanded by the complaint, is, however, inadmissible, and, if made, a new trial will be granted. *Corning v. Corning*, above noticed.

Where one party has been allowed to amend, the court will be disposed to grant the same privilege to the other, though otherwise it might not have been permitted. *Hoxie v. Cushman*, 7 L. O. 149.

An exception will not lie to a refusal of a judge to order an amendment at the trial, unless the party has shown a clear case of unquestionable right. *Roth v. Schloss*, 6 Barb. 308; *Brown v. McCune*, 5 Sandf. 224; *Phinck v. Vaughan*, 12 Barb. 215. "It is a question addressed to the discretion of the judge. His decision is not, therefore, the subject of review."

In *Bedell v. Powell*, 13 Barb. 183, it was held to be erroneous, for the judge, after trial of an issue as to whether a former action had or had not been discontinued, to allow the plaintiff to enter a rule for that purpose, *nunc pro tunc*; and, on such rule being entered, and the costs tendered, to overrule the previous defence. An order of this description is not authorized by the section now in question, it being laid down, that a discretion not reviewable as a general rule, should be exercised soundly, and not so wielded as immediately to cut off a party from the attainment of a clear legal right. See this latter principle recognized in *Roth v. Schloss*, above noticed.

### § 197. *Objections on Trial.*

*Generally considered, Waiver of, if not taken in due time.*—The extent to which the Code has altered the rules of evidence, and those as to the competency or incompetency of witnesses, has been examined, and the cases cited in a previous chapter. It must be borne in mind that, as heretofore, every exception or objection as to the competency of witnesses, or as to the nature or admissibility of their testimony, or of the other evidence on any particular point, must be taken or made forthwith, and before the witness is heard or the evidence passed on by the court, or the right to take such objections will be lost. See *Leach v. Kelsey*, 7 Barb. 466; *Cook v. Hill*, 3 Sandf. 341.

The defendant's counsel will, of course, take especial care to restrict the plaintiff to such evidence as is warranted by the actual record, and to object to any testimony whatever, which goes beyond the allegations apparent upon the pleadings. The rule in this respect will be found strictly laid down, in *Bristol v. The Rensselaer and Saratoga Railroad Company*, 9 Barb. 158. The converse of this proposition is, of necessity, equally applicable, as regards evidence adduced by the defendant.

Of course, objections of this nature must be taken at the moment such testimony is offered, with a view to its exclusion



from being given at all. It may, in fact, be laid down as a general rule, that all technical objections, whether affecting the case in general, or any particular branch of it, must be taken at once, either on the opening, if of a preliminary nature, or else, directly on the occurrence of the circumstance out of which the objection arises; or the right to make such objection will, in ordinary cases, be gone. Such objections must be thus taken, "so as to enable the party to supply, if possible, the alleged defect;" and, if this be omitted, the party making that omission will not be permitted to avail himself of such objections, on the motion for a new trial. *Merritt v. Seaman*, 6 Barb. 330. This is styled "a well-established rule," in *New York and Erie Railroad Company v. Cook*, 2 Sandf. 732. Thus, too, objections cannot be so taken to the complaint, when the defendant has failed to demur. *Carley v. Wilkins*, 6 Barb. 557.

The above doctrine, *i. e.*, that objections, omitted, to be taken on the trial, cannot afterwards be insisted on, but will, on the contrary, be deemed as altogether waived, is further supported by numerous other cases, more recently decided than the foregoing. See this principle fully carried out in *Laimbeer v. City of New York*, 4 Sandf. 109; *Stoddard v. Long Island Railroad Company*, 5 Sandf. 180; *Howland v. Willetts*, 5 Sandf. 219; *Teall v. Van Wyck*, 10 Barb. 376; *Hunter v. Osterhoudt*, 11 Barb. 33; *Crook v. Mall*, 11 Barb. 205; *Ingraham v. Baldwin*, 12 Barb. 9, affirmed by the Court of Appeals, 7th Oct., 1853; *Thompson v. Dickerson*, 12 Barb. 108; 1 C. R. (N. S.) 213; *Buffalo and New York Railroad Company v. Brainerd*, and *Hastings v. McKinley*, Court of Appeals, 7th Oct., 1853; *Coon v. The Syracuse and Utica Railroad Company*, 1 Seld. 492; *Dayharsh v. Enos*, 1 Seld. 531; *The People v. Norton*, Court of Appeals, 31st Dec., 1853; *Waterville Manufacturing Company v. Brown*, 9 How. 27. In relation to a similar waiver of objections, by admissions or proceedings anterior to the trial, see likewise *Morse v. Cloyes*, 11 Barb. 100, before cited.

If a deficiency in the plaintiff's proof, is supplied, during the trial, by the defendants themselves, it is a waiver of any exception they may have taken, based on such deficiency. *Westlake v. St. Lawrence County Mutual Insurance Company*, 14 Barb. 206; *Bean v. Canning*, 10 L. O. 248.

Nor can an exception be sustained, as ground for a new trial, when the objection, though properly taken at the time, has

been subsequently removed on the trial itself, by supplying other evidence. *Bronson v. Winan*, 10 Barb. 406, affirmed by Court of Appeals, 12th April, 1853.

*Waiver of, by Admission.*]—The provisions of sec. 168, under which, every uncontroverted allegation on the pleadings is to be taken as true, will, of course, be borne in mind, in getting up the evidence for the hearing. A misapprehension on this subject, will form no basis for an application for a new trial on the ground of surprise. *Wilcox v. Bennett*, 10 L. O. 30.

Where, on the trial of a cause, the counsel agree as to what is admitted by the pleadings, and the judge, without looking into them, assumes the statement of their contents to be true, the truth of that statement cannot be controverted for the first time, on the argument of an appeal. *Munson v. Hegeman*, 10 Barb. 112; 5 How. 223. The reversal by the Court of Appeals, 12th April, 1853, does not seem to affect this ruling.

*When not waived.*]—An admission on the pleadings is conclusive, and a judgment taken in opposition to it will be clearly erroneous. An objection, on that ground, must, therefore, if taken, prevail. *Bridge v. Payson*, 5 Sandf. 210. See, likewise, *Hackett v. Richards*, 11 L. O. 315.

Objections, grounded on a want of jurisdiction, either as regards the person sued, or the subject-matter of the action, are tenable, at any time, and at any stage of the cause, and are incapable of waiver. See this subject heretofore considered in several previous chapters, and especially in relation to courts of limited jurisdiction, and under the heads of Parties and Demurrer.

In *Browne v. McCune*, 5 Sandf. 224, the defence of infancy was sustained, and the doctrine of estoppel maintained to be wholly inapplicable in such a case, even where actual fraud was shown; and a motion to amend the pleadings was accordingly denied.

The objection, on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not waived by an omission to state it on the pleadings. See this subject heretofore considered, and the cases in point cited, under the head of Demurrer. If not taken on the trial, however, it seems more than doubtful whether it can subsequently be raised.

An objection, on the ground of insufficiency in the pleadings, has been held to be maintainable, even though the proofs might lead to a contrary conclusion. *Mallory v. Lamphear*, 8 How. 491. Nor can any proceeding be maintained by the plaintiff, when it appears, upon the face of his complaint, that he has no title to relief. *Bennett v. The American Art Union*, 5 Sandf. 614; 10 L. O. 132.

If any objection taken be overruled by the court, a formal exception should be at once taken, and the court requested to note it, according to the ordinary practice.

With a view to this, and, indeed, to the general conduct of the cause, it is impossible to insist too strongly upon the necessity of full and accurate notes being taken, of all that passes at the hearing, a duty sometimes imperfectly performed. The subject of exceptions, and the mode in which they may be made available, will be further considered in a subsequent chapter, under the head of New Trial. Where the exceptions taken are of an important nature, it will be expedient to apply, at the time, under sec. 265, that they be heard in the first instance at the general term. See this subject further considered, and the cases cited, in the chapter last alluded to.

## § 198. *Other Incidents of Trial, generally considered.*

*Separate Trials.*—The provisions of sec. 258, which allow of a separate trial between the plaintiff and any of several defendants, whenever, in the opinion of the court, justice will be thereby promoted, will, of course, not be overlooked. *Robinson v. Frost*, 14 Barb. 536, and *The People v. Cram*, 8 Barb. 151, are instances of a separate judgment being taken, against defendants jointly sued at the outset. See, likewise, *Fullerton v. Taylor*, 6 How. 254, 1 C. R. (N. S.) 411; and *Downing v. Mann*, 9 How. 204.

*Granting Reference.*—It is competent, as heretofore, for either party to move for a reference, or for the court to direct one, either at the outset, or during the progress of the trial, in case it clearly appears that the examination of a long account is involved, or that the case is otherwise one, in which a reference, under the provisions of sec. 271, is the proper course. The granting of such reference, if involving the whole issue, at

once stops the proceedings. If, on the contrary, such reference be merely subsidiary, and for the information of the court before judgment, (see subdivision 2 of that section,) and the main issues in the cause are capable of being at once submitted to the jury, the case will go on in its ordinary course.

A subsidiary reference will not, however, be granted, though otherwise as of course, where the court is satisfied, at the hearing, that all the facts are before it, and that the plaintiff cannot establish a sufficient title to relief. *Dominick v. Michael*, 4 Sandf. 374. See, heretofore, under the head of Motion for a Reference, and hereafter, under that of Trial by Referees.

*Admissions on Trial.*—It is, of course, a frequent practice in cases where the proceedings are fittingly carried on, to save the time of the court and the parties, and diminish the costs, by admitting facts known to be certainly provable. An abuse of this practice, will, however, be guarded against. Thus, in *Niles v. Lindsley*, 8 How. 131, 1 Duer, 610, where a claim of title arose upon the pleadings, and was put in issue by the defendant, it was held that he could not save the costs of course, which follow a verdict of this description, by admitting the title on the actual trial, after the plaintiff had been put to the expense of preparing to prove it, by reason of his previous denial.

*Postponement of Trial.*—In the event of the absence of a material witness, or any other cause rendering a postponement of the trial necessary, an application may be made to the court, as under the former practice, which remains unchanged in this respect. If the application be made in good faith, and with due diligence, a mere statement of the absence of such witness, and of the reason for such absence, will be sufficient, without entering into any details as to the nature of his supposed testimony. See *Pulver v. Hiscrodt*, 3 How. 49.

### § 199. *Course of Trial.*

THE Code effects little or no change, in respect to the course of trial in general, of whatever nature. The old rules, that the counsel for the party sustaining the affirmative of the issue to be tried, is first heard in opening, and last in summing up the case, and also as to the general conduct of the cause, during

the hearing, remain unaltered, by the Code, or the recent decisions. The former regulations in relation to the action of counsel, are continued, by Rule 13 of the Supreme Court, which provides that "On the trial of issues of fact, one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause, unless the justice who holds the court shall otherwise order." Prior to the revision of 1852, this rule only related to trials on the circuit; it now extends to all, of every description whatsoever. By Rule 14, as now altered, it is also further provided that "at the hearing of causes at a general or special term, not more than one counsel shall be heard on each side, and then, not more than two hours each, except when the court shall otherwise order," in analogy with the practice of the Court of Appeals, as similarly fixed by Rule 12 of that tribunal. On the revision of the Rules on 3d August, 1854, it has been provided, that the examining counsel shall stand, while examining a witness, and that he shall not take minutes of testimony, unless the justice holding the court shall otherwise order. See Rule 13, as last amended. This regulation is evidently made with a view to curtail the time so occupied, as far as practicable. What its effect may be in practice is doubtful, and whether he be able to do so himself or not, no prudent practitioner will neglect to take, or to have taken by an amanuensis, sufficiently full and accurate notes of the testimony given, such as may, at all events, be sufficient for his own use on the trial, and for the purpose of drawing up a case, for review of the decision of the court or jury, if adverse.

*Notice of incidental Decisions.*]—In preparing the above chapter for publication, notes were made by the author, of numerous recent decisions, on various points of law, incidentally bearing on the conduct of trial generally considered, but irrespective of the provisions of the Code on that subject, or of the practice under those provisions.

To enter into a detailed analysis of these decisions, bearing as they do on questions of mere law, as contradistinguished from questions of practice, would necessitate a complete departure from the plan of the present work, and, at the best, would be of little if any real use. It must either enter into a detailed consideration of the numerous earlier cases, establish-

ing the law on the same and on similar points, which would involve the composition of a lengthened treatise, or, if not, it would, of necessity, be superficial in its nature, and, for practical purposes, valueless.

An enumeration of those decisions as below made, may, however, save some little trouble, as affording the means of an easier reference to the cases themselves; and, therefore, the author, having the classification before him, has thought it may not be unacceptable, to submit it, such as it is, to the profession. The cases in question refer too, for the most part, to the earlier decisions in point, and will therefore form an additional guide for a convenient reference to the law, as laid down, under each particular state of circumstances.

Without further preface, the decisions referred to may be classified as follows:

As to evidence of usage—*Vail v. Rice*, 1 Seld. 157; *Beirne v. Dord*, 1 Seld. 95; *Hargraves v. Stone*, 1 Seld. 73; *Wall v. The Howard Insurance Company*, 14 Barb. 383; *Bronson v. Wiman*, 10 Barb. 406; *Bowen v. Newell*, Court of Appeals, 12th April, 1853.

On the question of *Res Adjudicata*, or the conclusiveness of official proceedings, in its various forms—*Lansing v. Russel*, 13 Barb. 510; *Spicer v. Norton*, 13 Barb. 542; *Buell v. The Trustees of Lockport*, 11 Barb. 602, affirmed by the Court of Appeals, 12th April, 1853; *Burdick v. Post*, 12 Barb. 168; *Briggs v. Wells*, 12 Barb. 567; *Green v. Clark*, 13 Barb. 57; *Kelsey v. Bradbury*, 12 L. O. 222; *Baker v. Rand*, 13 Barb. 152; *Edwards v. Stewart*, 15 Barb. 67; (*Reynolds v. Brown*, 15 Barb. 24; *Henderson v. Cairns*, 14 Barb. 15;) *People v. Downing*, 4 Sandf. 189; *Waterbury v. Graham*, 4 Sandf. 215; *Birckhead v. Brown*, 5 Sandf. 134; *Doty v. Brown*, 4 Comst. 71; *Reynolds v. Davis*, 5 Sandf. 267; *Oakley v. Aspinwall*, 1 Duer, 1, 10 L. O. 79; *Dobson v. Pearce*, 1 Duer, 142; 10 L. O. 170; *McCarthy v. Marsh*, 1 Seld. 263; *Dyckman v. The Mayor of New York*, 1 Seld. 434; *Sheldon v. Wright*, 1 Seld. 497; *Vanderpoel v. Van Valkenburgh*, 2 Seld. 190; *Burhaus v. Van Zandt*, Court of Appeals, 30th December, 1852. See, also, as to the conclusiveness of an Inquisition in Lunacy—*Wadsworth v. Sherman*, 14 Barb. 169.

In relation to the charter and ordinances of the City of New York—*Howell v. Ruggles*, 1 Seld. 444; *People v. Mayor of New York*, 7 How. 81.

As to the admissibility of entries in the books of a party, read without objection—*Brahe v. Kimball*, 5 Sandf. 237; *White v. Ambler*, Court of Appeals, 12th April, 1853. See, also, in relation to entries in general—*Howland v. Willets*, 5 Sandf. 219; *Cole v. Jessup*, Court of Appeals, April 18th, 1854.

As to the declarations of parties—*Ogden v. Peters*, 15 Barb. 560; *Carpenter v. Sheldon*, 5 Sandf. 77; *Bearss v. Copley*, Court of Appeals, 18th April, 1854; and in criminal cases, *The People v. Hendrickson*, 8 How. 404, Notes of Court of Appeals, 18th April, 1854, 9 How. 155.

As to the order of trial, and admissibility and burden of proof—*Catlin v. Hansen*, 1 Duer, 309; *Bedell v. Powell*, 13 Barb. 183; *Catlin v. Gunter*, 1 Duer, 253, 11 L. O. 201; *Wright v. Douglass*, 10 Barb. 97; *McKnight v. Dunlop*, 1 Seld. 537; *Boyle v. Colman*, 13 Barb. 42; *McCurdy v. Brown*, 1 Duer, 101; *Dunckle v. Kocker*, 11 Barb. 387.

As to the inadmissibility of inferior evidence, when better can be procured—*Waterville Manufacturing Company v. Bryan*, 14 Barb. 182; *Same case*, 9 How. 27; *Handley v. Greene*, 15 Barb. 601.

As to the admissibility of parol evidence in relation to a previous contract—*Bell v. Holford*, 1 Duer, 58; *Jones v. Osgood*, 2 Seld. 233; *Stroud v. Frith*, 11 Barb. 300.

As to evidence in special cases, viz.:

In relation to bills and promissory notes, presentment and protest—*Sawyer v. Warner*, 15 Barb. 282; *Burbank v. Beach*, 15 Barb. 326; *Pratt v. Gulick*, 13 Barb. 297; *James v. Chalmers*, 5 Sandf. 52; *Cook v. Litchfield*, 5 Sandf. 330, 10 L. O. 330, affirmed by Court of Appeals, 31st December, 1853; *Cayuga County Bank v. Warden*, 2 Seld. 19.

In actions for personal torts—*Bush v. Prosser*, 13 Barb. 221; *Smith v. Waite*, 7 How. 227; *Stiles v. Comstock*, 9 How. 48. See, likewise, heretofore under the heads of slander, libel, &c.

In ejectment, and as to adverse possession—*Lane v. Gould*, 10 Barb. 254; *Hill v. Draper*, 10 Barb. 454; *Livingston v. Turner*, 12 Barb. 481; *Parsons v. Brown*, 15 Barb. 590.

In replevin—*McCurdy v. Brown*, 1 Duer, 101.

As to presumption of payment—*Waddell v. Elmendorf*, 12 Barb. 585.

Of fraud, in action on contract—*Brown v. McCune*, 5 Sandf. 224.

As to evidence of value, and the opinions of witnesses, on that and other points—*Westlake v. St. Lawrence Mutual Insurance Co.*, 14 Barb. 206; *Beekman v. Platner*, 15 Barb. 550; *Harris v. Roof's Executors*, 10 Barb. 489; *De Witt v. Barley*, 13 Barb. 550, affirmed by Court of Appeals, 31st December, 1853; *Boyle v. Colman*, 13 Barb. 42; *Bearss v. Copley*, Court of Appeals, 18th April, 1854; *McGregor v. Brown*, Same court, 18th April, 1854.

As to the evidence of one witness only, in contradiction to answer—*Jacks v. Nichols*, 1 Seld. 178. In other cases—*Beattie v. Qua*, 15 Barb. 132.

As to impeaching or contradicting a witness—*Sprague v. Cadwell*, 12 Barb. 516; *Morgan v. Frees*, 15 Barb. 352; *Gilbert v. Sheldon*, 13 Barb. 623.

As to evidence of bad character of the plaintiff himself—*Anon.*, 8 How. 434.

As to the privileges of witnesses—*Van Pelt v. Boyer*, 7 How. 325.

As to recalling a witness—*Dunkle v. Kocker*, 11 Barb. 387.

As to the power of a witness to refresh his memory on the trial, and the power to call for the production of his books, when he is able to swear to their contents—*Howland v. Willetts*, 5 Sandf. 219; *Van Buren v. Cockburn*, 14 Barb. 118.

## CHAPTER II.

### TRIAL OF AN ISSUE OF LAW.

COMPARATIVELY few remarks will suffice for this branch of the subject, separately considered.

#### § 200. *Course on Trial.*

*Preparations for.*]—The papers necessary to be prepared, for the purpose of bringing on an issue of this description, have already been noticed, under the head of Preparations for Trial. They consist, simply, of a copy for the court, of the summons



and the pleadings on which the issue has been joined. In many cases, however, the preparation and service of points, as on an appeal, would be convenient, though not indispensable. In no case need the papers be printed, under the rules as they at present stand.

*Actual Hearing.*—Where issues of law and of fact are joined in the same case, the former are to be first tried, unless otherwise directed. See this subject fully considered in a previous chapter, involving a notice of the fluctuations of the Legislature, and of the consequent directions of the courts in relation to the question, as to whether issues of this nature were primarily cognizable by the special, or by the general term. See also the Rules of Court limiting the arguments of counsel, as noticed in the previous chapter, and which are unquestionably applicable to a trial of this description. On a demurrer to answer or reply, it is settled, under the new as under the old practice, that a party, whose pleading is demurred to, may go behind it, and attack the previous pleading of his adversary, when that pleading is defective in substance; and, if he succeed in establishing a defect of this description, he will be entitled to judgment in his favor, notwithstanding the deficiencies of his own pleading. *Stoddard v. Onondaga Annual Conference*, 12 Barb. 573; *Fry v. Bennett*, 5 Sandf. 54, 9 L. O. 330, 1 C. R. (N. S.) 238; *Schwab v. Furniss*, 4 Sandf. 704, 1 C. R. (N. S.) 342; *Burnham v. De Bevoise*, 8 How. 159. The defect, however, to be so impeachable, must be substantial, and such as would have entitled the objecting party to judgment, had that objection been originally taken in due form.

A default may be taken on a trial of this nature, as well as on that of an issue of fact. See the succeeding chapter on this subject.

## § 201. *Course on Decision.*

The decision of the single judge upon such an issue, is subject to precisely the same conditions, as that upon an issue of fact triable by the court. See chapter V. of the present book, under that head.

The immediate concomitants of the decision, when pro-

nounced, before the formal entry of judgment thereon, remain to be considered.

*On Demurrer to whole pleading. Leave to Amend.*—If a demurrer to the whole pleading be allowed, the entry of judgment for the demurring party follows, as of course, unless leave to amend be given by the court, or applied for and obtained by counsel. This application will be a matter of absolute necessity, unless it be meant to abandon the litigation altogether, or to rest the case exclusively on an appeal from the allowance of the demurrer, without raising any contestation as to the facts.

The application for the above purpose may be made at the time the decision is pronounced, or afterwards, on special motion or order to show cause: the former is the more usual course. If the application be made *bonâ fide*, the court will rarely refuse it; but it is competent to the adverse party to oppose, and, where the pleading is evidently of a frivolous nature, that opposition may possibly prevail.

In cases where a demurrer has been allowed, on the ground of the improper joinder of diverse causes of action, special powers are given to the court to impose strict terms upon the plaintiff, with regard to the proper division of those causes in the amended pleading, as a condition precedent to granting leave to amend. See the last sentence of sec. 172, as amended. The payment of the costs of the demurrer will also generally be imposed, *Getty v. The Hudson River Railroad Company*, 8 How. 177, and should be always asked for.

If, on the contrary, a demurrer to the whole pleading be overruled, the opposite party becomes entitled to sign judgment, as of course, unless leave be given to plead over. Where the demurrer has been clearly frivolous or untenable, such leave may be refused by the court. See numerous cases to this effect, cited in the preceding chapters, and particularly in those on the subject of demurrer, and plaintiff's proceedings on receipt of the defendant's pleading.

Where, however, the demurrer has been taken in good faith, the courts have, as a general rule, been disposed to grant leave to the defendant to plead over. This is, in fact, made the subject of express provision in sec. 172. The imposition of terms is a matter almost of course in such cases; and, if asked for at the time, the court will frequently prescribe conditions as to the

nature of the substituted defence—as, for instance, that the statute of limitations should not be pleaded; though, if then omitted, it will be too late to make the same demand at a later period. The court will not, however, be disposed to take the same course, with regard to the defence of usury. *Grant v. McCaughin*, 4 How. 216.

*Course on Leave to Amend, on Partial Demurrer.*—If leave to amend be granted to the plaintiff, on the one hand, or leave to plead over, to the defendant, on the other; or if the demurrer be only to part of a pleading, leaving other parts of it unaffected, on which a sufficient issue of fact has been raised, the decision of the judge should be entered as an order, and a copy served on the opposite party, in the usual manner; though no further action can be taken on such proceeding, until the remaining issues in the cause have been disposed of. Where the demurrer has been to part of a pleading, and has been allowed, that part becomes a nullity for all further purposes. Where leave is given to amend or plead over, nothing further can be done until the expiration of that period, or of any extension thereof duly obtained; and, if the adversary avail himself of the facilities thus granted, in due time, a new issue will be raised, and the former proceedings will become obsolete, except in so far as they control those subsequent, by preventing the matter objected to from being again brought forward.

The review of the decision on a demurrer, whether total or partial, and the questions which have arisen as to whether, under different states or circumstances, that decision should or should not be entered as a judgment, or as an order respectively, will be fully considered hereafter, under the heads of Judgment and Appeals.

*Omission to amend after leave given, Consequences of, and Course of Adverse Party.*—If, however, on the contrary, the party in default suffer the time allowed him to elapse, without taking the necessary steps, he will be precluded from further amendments, if the demurrer be partial; or, if it be to the whole pleading, the party prevailing will be entitled to sign judgment on such demurrer, in the usual manner, exactly as if leave to amend or plead over had not been asked for; or, if asked for, had been refused. All that will be required for the

purpose of signing such judgment, will be proof of the service of the order, and, likewise, that the conditions thereby imposed have not been complied with. On these an order should be applied for *ex parte*, either that immediate judgment should be entered, or that the opposite party should show cause why such should not be the case; or a notice of motion may be given to the same effect. On the return of this order, or the hearing of the motion, the relief will be as of course, unless the opposite party be prepared with his fresh pleading, and obtain leave to put it in, which he can only do upon special leave, and on payment of all costs, including the costs of the motion.

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## CHAPTER III.

### OF TAKING DEFAULT OR INQUEST.

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*General Remarks.*—These two proceedings are, in some respects, distinct; in others, analogous. They are distinct, in so far that inquest is an extraordinary remedy, obtainable out of the regular course, by the plaintiff alone, and not by the defendant, and that, only under peculiar circumstances, and only as regards issues of fact; whilst default is a regular proceeding, free to be obtained by either party, taken in the ordinary march of the cause, and applicable to all trials whatever. The analogy between them, as being both *ex parte* proceedings, upon the failure of the opposite party to sustain his case, is however, so close, that they will be most conveniently treated in the same chapter, and in connection with each other.

#### § 202. *Default.*

Where judgment by default is taken, the party taking such judgment must be in readiness in court, at the time the cause is called on in its course, and must answer to the call. He must also be prepared with the notice of trial, and with due proof of service, either by the admission of the opposite attor-

ney, or by affidavit in the ordinary form. If the default be taken on the part of the plaintiff, evidence must be ready to prove the existence of the cause of action, if not admitted upon the pleadings, (in which case no further evidence is necessary); and, if the action be upon a promissory note, or other instrument for payment of money, the instrument itself must be in court. A calculation of the amount due for principal and interest, must also, in the last case, be prepared and sworn to. Where, however, unliquidated damages are claimed, the court will order them to be assessed by a jury; a reference cannot properly be taken for this purpose, and, if taken, will be irregular, and may be set aside, *Hewitt v. Howell*, 8 How. 346. If, on the contrary, the case is not one in which damages are claimed, and the examination of a long account be involved, a reference may either be directed, or, if the account be simple, and the proof of it ready in court, the court may act upon such proof, at their discretion, without going through the form of a reference.

The above observations have respect to the taking a default on the part of the plaintiff. If, on the contrary, that measure be taken on the part of the defendant, all that, under ordinary circumstances, will be required, will be the production of the counter notice of trial, and due proof of its service.

The defendant cannot, however, take such judgment as of course, unless he has himself noticed and placed the cause upon the calendar, by means of a counter note of issue. If he omit this precaution, he will be left to his motion to dismiss the complaint, in the ordinary course of proceedings, as before treated of. The precaution of filing a counter note of issue, and giving a counter notice, is so easy and so simple, that it ought never to be omitted. His giving the counter notice alone will be inefficient, unless he himself place, or see that the plaintiff places the cause upon the calendar. If this be not the case, he cannot move to dismiss at the circuit, and such a dismissal, if obtained, will be set aside as irregular, *Browning v. Paige*, 7 How. 487.

A judgment of dismissal may, however, be taken, on any subsequent day during the same circuit, in case the plaintiff is not ready on the first call, and subsequently fails to perform conditions then imposed. So held, with reference to a notice of discontinuance, accompanied by a tender of taxable costs,

but not of an allowance which had been made by the court, in *Moffatt v. Ford*, 14 Barb. 577.

Where the cause has once been passed, and set down for a future day by consent, the effect of which consent is, that it eventually goes over the circuit altogether, it will amount to a waiver on the part of the defendant, and will preclude him from moving to dismiss, on the ground that the plaintiff was not ready at the first call. *Fuller v. Sweet*, 9 How. 74.

The above is all that will be required on the part of the defendant, in order to obtain the ordinary judgment of dismissal against the plaintiff. If, however, he claim affirmative relief in his answer, and his right to such relief be not admitted upon the pleadings, he should be prepared with proof of the existence of such counter-claim, and also of the amount due to him thereon, if in the nature of a set-off, exactly as if the positions of the parties were reversed, and such affirmative relief was sought by him as plaintiff.

The defendant's power to move for a dismissal cannot, however, be exercised in any manner, so as to prejudice the rights of the plaintiff, inherent or acquired. Thus, where the defendant had made an offer to take judgment, and, during the ten days allowed to the plaintiff to make his election, moved for a dismissal at the circuit, the order, so obtained, was set aside. The offer amounted to a stipulation by the defendant, that no proceedings should be taken, during the time allowed to the plaintiff, nor could the latter be barred of his right to that time, by any thing, short of a written acceptance or refusal. A mere parol declaration by his attorney, would not avail to do so. *Walker v. Johnson*, 8 How. 240.

An amended complaint, served by the plaintiff, was, in like manner, held to preclude the defendant from taking a default. He could not disregard it, as there claimed, however irregular it might appear to be, *prima facie*. His only course was to apply to the court upon motion. *Rogers v. Rathbun*, 8 How. 466. See the subject of amendments further considered in the succeeding section, in relation to inquest.

Either party, attending prepared as above, is entitled to bring on the cause at once, when called, and to take his judgment, if the opposite party fail to appear. A jury is not necessary, as the very failure to appear of itself renders the action triable by the court, under sec. 266; and the affirmative right of the applicant to relief, and the amount of the relief claimable,

being shown, either by admission on the pleadings, or by *ex parte* evidence, if requisite, the judgment of the court follows, as of course. Attention should be paid to Rule 26, which prescribes that, on taking an order of this nature, the moving counsel's name should be endorsed upon the paper containing the proof of notice.

Where, however, the opposite party is really and *bonâ fide* prepared for trial, and his absence at the moment the cause is called on is a mere matter of accident, the application for judgment by default would be not merely ungracious, but practically useless. Under these circumstances, the court will open a default so taken, almost as of course, on an application for that purpose. In cases, on the contrary, of wilful or vexatious delay, or virtual abandonment of his case by the opposite party, the taking a default will be a fitting and appropriate remedy. The question of opening a default or judgment, so taken, will be considered at the close of the chapter.

In some tribunals, such as the New York Common Pleas, where a strict practice prevails in relation to the calling the calendar, and where, in case the parties are not ready at the time of the call, the cause may not be reserved by the court, but may lose its place altogether, the taking a default *pro forma* may even be a matter of accommodation to both parties. An order opening that default, by consent or otherwise, will have the effect of replacing the cause on the term calendar, and, if that course be agreed on, and the technical costs be waived, the only real expense will be the clerk's trial fee, which must of course be paid; whilst the practical convenience, in accelerating the real trial of the cause, may be very great.

In general, however, the courts are not adverse to postpone causes, from one day of the same term to another, on sufficient cause shown. It will of course be necessary for the counsel, or for one at all events, to attend for that purpose, at the sitting of the court. The accommodation rests, however, entirely with the presiding judge, whose discretion on the subject, either as to granting the request, or requiring formal proof of the reasons alleged for the postponement is, of necessity, uncontrollable.

### § 203. *Inquest.*

Inquest, as before stated, is of a nature analogous to, and yet distinct from that of default, inasmuch as it is an *ex parte*

remedy, obtainable by the plaintiff alone, and that, only in cases virtually undefended; and this, by bringing on the cause prematurely, and out of its due order, instead of waiting for its being called on in ordinary course.

The remedy by inquest can only be had in default of a sufficient affidavit of merits. If such an affidavit be duly filed and served by the defendant, at any time previous to the actual taking of such inquest, the plaintiff's right to this remedy will be gone. The nature and requisites of the affidavit of merits have been considered in a previous chapter.

In applying for an inquest, the plaintiff must take care that the time allowed to the defendant, for the purpose of amending his answer, has previously elapsed. If not, and if the defendant afterwards serve such amended answer in good faith, and within due time, the inquest will be irregular, and will be set aside as such. *Washburn v. Herrick*, 2 C. R. 2; 4 How. 15.

An inquest, so obtained, was likewise set aside upon the service of an amended answer, in *Griffin v. Cohen*, 8 How. 451, the good faith of the amendment being sworn to. See likewise, *Rogers v. Rathbun*, before cited under the head of Default. In *Allen v. Compton*, on the contrary, 8 How. 251, an inquest, obtained notwithstanding the service of such an answer, was maintained, the answer appearing to have been so amended for delay only, and with a view to throw the cause over the term.

In *Plumb v. Whipple*, 7 How. 411, an inquest was, in like manner, supported, though an amended answer had been served, the original answer consisting of denials only, and containing no new matter, and, as such, requiring no reply, and therefore, in the opinion of the court, not being amendable at all. It was held, too, that the right to amend cannot be exercised, so as to prejudice proceedings already had, and that, therefore, the judgment suffered to be taken must be allowed to stand.

An inquest may be taken at the opening of the court, on any day after the first day of the term or circuit, for which the cause shall have been duly and sufficiently noticed; for, if the intention to take an inquest be not expressed upon the notice of trial, that notice will not avail. On the second, or any subsequent morning of term, therefore, the plaintiff, at the opening of the court, may apply to have the cause called on for that purpose, though such cause be not on the day calendar, and without regard to its actual position on the general list. If taken on the



first day of term, the inquest will be a nullity, and will be set aside as such. *Smith v. Brown*, 1 Duer, 665.

It has been an usual practice to take an inquest of this description before a jury, and, in *Dickinson v. Kimball*, 1 C. R. 83, it was held that one taken, after the jury had been discharged, the defendant not appearing, was irregular. The latter, it was said, might have waived his right to a jury by non-appearance, but, after the jury had been discharged, there was no longer any such right to waive. The inquest, it was accordingly held, should, have been taken, before the jury were discharged.

At first sight, this case would seem to lead to the conclusion that inquest must be taken by a jury in all cases, but, when more closely examined, this does not appear to be the correct construction. In *Haines v. Davies*, 6 How. 118, 1 C. R. (N. S.) 407, it was decided that if, when the case is called on, the defendant does not appear, the plaintiff may then proceed to treat such non-appearance as a waiver of trial by a jury, under sec. 266, and may take his inquest before the court alone; and that there is no difference, in respect of such waiver, between those cases in which the cause is taken up out of its order, and those in which a default is taken on its being regularly called. The case must, however, be called on, and the inquest taken, before the jury are discharged, for the circuit or term, as, otherwise, there will be no right to waive, according to the doctrine laid down in *Dickinson v. Kimball*, which is so far confirmed.

The object of this rule is to give the defendant the opportunity to submit the case to the jury, if, when the cause is so called on, he be in attendance and appear. He has a right, in this event, to cross-examine the plaintiff's witnesses, and break down his case, if he can succeed in doing so. He cannot, though, introduce counter evidence, or prove an affirmative defence on his own behalf, his right to do so being gone by default. It would seem, however, that he may take exceptions to the admissibility of the plaintiff's evidence, and appeal from the decision thereon, though the question is by no means free from doubt, whether he can do so on a judgment by default. See *Kanouse v. Martin*, 3 Sandf. S. C. R. 653. His easier and more obvious course, where any real defence exists, will evidently be a motion to set aside the inquest.

The plaintiff, on his part, may, it would seem, submit to a nonsuit, if the defendant appear, and it be thought advisable.

He must of course be prepared with precisely the same evidence as hereinbefore indicated, with reference to a default taken on the cause being regularly called on.

Where a partial set-off has been pleaded by the defendant, and no reply has been put in, the plaintiff cannot take an inquest for the whole of his original demand, but must allow the set-off, and, if he omit to do so, his proceedings will be set aside. Nor is it necessary for the defendant to make an affidavit of merits, to entitle him to protection in this respect. *Potter v. Smith*, 9 How. 262.

A remedy, analogous to inquest in some respects, though in others distinguishable, inasmuch as the case comes on in a contested form, and not *ex parte*, is provided as regards the first district of the Supreme Court, by the recent special Rules on the subject, already noticed under the head of proceedings with a view to a speedier decision. The proceeding is, in fact, identical with the English practice in chancery, of setting apart one morning in each week for hearing causes, certified by counsel to be "short causes," in preference to those on the regular calendar. The practice is highly convenient, and eminently calculated to further the ends of justice, above all in a district in which, as in that in question, the calendars are crowded.

### § 204. *Opening Default, or Inquest.*

If inquest or default be taken against either party unawares, he will, as a general rule, be admitted to prosecute or defend, under the enabling powers of sec. 174, provided he satisfies the court, of the existence of a *bonâ fide* defence or cause of action, and, that the adverse proceeding has been obtained against him, through "mistake, inadvertence, surprise, or excusable neglect." He must, of course, in the case of inquest, swear to merits, in the usual form.

The application for this purpose must be made on the usual notice. An order to show cause why the inquest or default should not be set aside, will probably be found the more convenient form, as, by adopting that mode, an interim stay of proceedings on the judgment entered, or to be entered up, may be obtained, as part of the order. In this case, a copy of the affidavit on which the order has been obtained must be served

with it, in the usual manner. It is, of course, equally competent for the defendant or party, against whom judgment has been entered, upon inquest or default, to move to set aside such proceeding, as irregular, on affidavit of the irregularities committed, and that, either upon a notice or order to show cause, as above. The opposite party may meet such application by counter affidavits, in order to show that the inquest has been regular, and that no real cause had been shown for opening the order.

If default or inquest, duly obtained, be opened or set aside, for the purpose of allowing the opposite party to try the case on the merits, payment of costs will be imposed on such party, as a condition precedent; and it will likewise be competent for a plaintiff who has obtained such judgment, to apply to the court, that proper restrictions may be imposed on the defence to be set up. See observations in the last chapter, in respect to the analogous case of granting of leave to plead over, after the allowance of a demurrer. If, however, the inquest or default be set aside, on the ground of irregularity, costs will, of course, fall upon the irregular party.

The order to be made on the application, as above, must be duly entered, and a copy served by the prevailing party. If the inquest be set aside, or the default be opened upon terms, care must be taken that those terms are fully complied with forthwith, or, at all events, within the time limited by the court, a reasonable limitation to which effect should always be asked for by the adverse party. On compliance with these terms, the cause is restored to the position in which it previously stood, and must be noticed and brought on for trial accordingly. On failure in that compliance, the order setting aside the inquest or default becomes a nullity, and the opposite party will gain the right to proceed with the entry and enforcement of the judgment, as if it had never been made.

## CHAPTER IV.

## TRIAL BY JURY.

§ 205. *Constitution of Jury,—General Form of Trial.*

THE practice on this subject is but slightly affected by the Code, which merely provides as to the form of verdict and its consequences, and leaves the composition and duties of the jury, and the mode of trial before them, practically untouched. To enter, therefore, into details on these latter subjects, would militate with the plan laid down at the outset.

The provisions of the Revised Statutes, as to the return and summoning of jurors, as to special or struck juries, and as to the trial before the jury, when duly impanelled, will be found in articles 2, 3, and 4, of title IV., chap. VII., part III., of those statutes, 2 R. S. 411 to 424. In connection with the summoning and impanelling, see the recent case of *Porter v. Cass*, 7 How. 441. The usual course in these matters has been so entirely settled, that decisions affecting any important alterations are rare, and the recent reported cases work no change in the law as to the composition and duties of the jury, in a practical point of view, and little, if any, alteration in relation to the progress of the trial before them, prior to the delivery of their verdict. In relation to the law as to challenges to jurors, &c., the recent cases of *The President of the Waterford and Whitehall Turnpike v. The People*, 9 Barb. 161; and *The People v. Aichinson*, 7 How. 241, may be referred to. Objections, on the above grounds, must be taken at the time, and before the trial proceeds, or they will be waived altogether. *Dayharsh v. Enos*, 1 Seld. 531.

Referring, then, to the works on the old practice, for all details on these points, and assuming that the jury, whether common or special, have been duly summoned and impanelled; that the parties have exhausted their rights of challenge, whether peremptory or otherwise, and either to the array or to the polls; that a *tale*, if necessary, has been prayed; that all objections in relation to the composition of the jury have been raised and

disposed of; and that the required number of jurors have been duly chosen and sworn, according to the former and still subsisting practice; we now come to consider the proceedings before the jury, so constituted. The old rules, that the counsel of the party who sustains the affirmative issue, is first heard in opening, and last in summing up the case, and also as to the general conduct of the cause during the hearing, are equally unaltered, whether by the Code, or by the recent decisions.

The rules of court, restricting the arguments of counsel to two hours each, and also providing that not more than one on each side shall examine or cross-examine a witness, or sum up the cause to the jury, unless by special order of the court, and that counsel shall stand while examining a witness, and shall not take minutes of testimony, unless the court shall otherwise order, have been noticed in the preliminary chapter, as to trial in general.

The circumstances under which application may be made for a postponement of the trial, when necessary, and the conditions likely to be imposed on granting such application, have been before considered. A similar application may be made at the outset, or during the progress of the trial, when, through surprise or otherwise, it proves indispensable; though, of course, this privilege will not be granted, at that stage of the proceeding, on any other than on serious and important grounds, and on a perfectly *bonâ fide* application.

The old practice, as to moving for a nonsuit, either on the plaintiff's statement, or on his proofs, when he rests his case, including the discretionary powers of the court to allow or to refuse permission to enter into further evidence, after such resting; as to the summing up, by the counsel on both sides; as to the charge of the judge; as to the power of counsel to request him to charge upon any particular point, to any particular effect; as to the exceptions which may be taken to such charge, and the necessity of taking them at the time of its delivery; as to the framing of written issues, where expedient; as to the retirement and conduct of the jury; and, likewise, as to the powers of withdrawal of a juror, or of submitting to a nonsuit on the part of the plaintiff, before the jury have left the court, with the advantages of that course, under certain circumstances, remains entirely unaltered by the Code, or by the recent decisions.

§ 206. *Incidental Points as to Trial.*

*Adverse Nonsuit.*]—The granting a nonsuit, when moved for, rests entirely in the discretion of the judge, and a refusal on his part will be no ground of error, when there is any evidence whatever on a question of fact, on which to go to the jury. *Thompson v. Dickerson*, 12 Barb. 108. See *Bronson v. Wiman*, Court of Appeals, 30th December, 1852.

If, however, there is a complete failure of proof, so that, as a matter of law, the plaintiff cannot recover, it is the duty of the judge to grant the motion, and his refusal to do so will be error. *Carpenter v. Smith*, 10 Barb. 663. See, likewise, *Haring v. The New York and Erie Railroad Company*, 13 Barb. 9.

The practice, in the English courts, of entering a verdict for the plaintiff, but with leave to the defendant to move for a nonsuit, though not unknown, is unusual in this State. The taking a verdict, subject to the opinion of the court, is the more common course. *Downing v. Mann*, 9 How. 204.

In *Bennett v. The American Art Union Company*, 5 Sandf. 614, 10 L. O. 132, it was held, in general terms, that objections to the right of the plaintiff to maintain a suit, cannot be so waived by the consent of the parties, as to deprive the court of the power, or release it from the duty of considering them; which principle is doubtless capable of application to cases, in which the defendant may be entitled to move for a nonsuit, but might wish to waive his right.

“One of several defendants, sued for a tort, is entitled to a verdict, before the case of his co-defendants is submitted to the jury, if the testimony be such, that, if he were sued alone, he would be entitled to a nonsuit. This is not matter of discretion, but of right.” *Dominick v. Eacker*, 3 Barb. 17.

In relation to a nonsuit for misjoinder of parties, see *Spencer v. Wheelock*, 11 L. O. 329. The correctness of this decision seems, however, to be questionable. See heretofore, under the head of Demurrer.

*Province of Court and Jury respectively.*]—The general rule is, that all matters of law rest with the court, and matters of fact with the jury, to decide: the latter acting under the direction of the judge, in relation to questions of law, bearing upon the facts brought before them.

When the facts of the case are in any wise contested, the question rests with the jury, and cannot be withdrawn from them. See *Scott v. Pentz*, 5 Sandf. 572; *Thompson v. Dickerson*, 12 Barb. 108, above cited; *Gates v. Brower*, Court of Appeals, 31st Dec., 1853. See, likewise, *Borrodaile v. Leek*, 9 Barb. 611.

Where, on the contrary, the facts are admitted or proved without contestation, and the question is one of construction merely, or of the law as applicable to those facts, the decision rests with the judge, and the jury are bound to follow his directions. See *Matthews v. Beach*, 5 Sandf. 256; *Cook v. Litchfield*, 5 Sandf. 330; 10 L. O. 330; affirmed by Court of Appeals, 31st Oct., 1853. See, also, *Carpenter v. Smith*, and *Haring v. The New York and Erie Railroad Company*, above cited, in relation to nonsuit. If the judge allow a question, properly of law alone, to go to the jury upon the facts, it will be error. *Carpenter v. Sheldon*, 5 Sandf. 77; *Fay v. Grimstead*, 10 Barb. 321; *Bulkeley v. Smith*, 11 L. O. 300; *Gale v. Wills*, 12 Barb. 84; or, if he make a qualification in his charge, which is not authorized by the evidence. (*Same cases.*) Nor will a refusal to submit to the jury, a question *prima facie* clear, and not contradicted or explained, be error on the part of the judge. *The People v. Cook*, Court of Appeals, 12th April, 1853. The points above taken are clearly established by numerous prior decisions; but the above are mentioned, as being the most recent bearing upon them. With regard to the relative provinces of the judge and jury, on a mixed question of law and of fact, the judge's power to comment on the facts, and the propriety of an hypothetical charge, see *Bulkeley v. Keteltas*, 4 Sandf. 450.

In relation to the course to be pursued, on the judge's answer to inquiries made by the jury, see *Stroud v. Frith*, 11 Barb. 300.

It was held by the Court of Appeals, in *Howland v. Willets*, 31st Dec., 1853, that it is not error for the judge to allow the jury, when they retire for deliberation, to take with them a deposition read on the trial.

*Propositions or Requests to charge.*—It remains, as heretofore, an usual practice for counsel to submit to the judge, if thought expedient, either at the close of the argument or at the conclusion of his charge, specific propositions, with a view to their adoption by him in his instructions to the jury. If such propositions be sustainable, it is the judge's duty to notice and to

charge upon them; and, if he omit to notice them, or charge imperfectly upon the point requested, it will be error, and an exception will lie. The mode of doing so rests, however, entirely in his discretion; and it is by no means positively incumbent upon him, to submit the propositions to the jury *ipsissimis verbis*, or even to notice them in detail, provided he give faithfully their general import. See *Bulkeley v. Keteltas*, 4 Sandf. 450; *Sherman v. Wakeman*, 11 Barb. 254, affirmed by Court of Appeals, 7th Oct., 1853.

The requests made must, however, be made in such form, as that the judge may properly charge in the terms of that request without qualification, or his refusal to do so will not be error. *Bagley v. Smith*, Court of Appeals, 13th July, 1853.

If the points submitted be clearly tenable, a refusal to charge upon them, or an imperfect charge in relation to them, will be ground for a new trial. *Carpenter v. Stilwell*, 12 Barb. 128; *Gale v. Wills*, 12 Barb. 84.

Where, however, the questions attempted to be raised are evidently untenable, the judge will be right in refusing to charge the jury, in the manner, or to the purport requested. *Lyon v. Marshall*, 11 Barb. 241. Nor is a judge bound to charge upon a hypothetical case, which there is no evidence to support. *The Mayor of New York v. Price*, 5 Sandf. 543.

In the absence of positive imputation against it, the charge of the judge will, in all cases, be supported. *Parsons v. Brown*, 15 Barb. 590. The same case lays down, strongly, the necessity of propositions of the above nature, being submitted to the judge at the time. In the absence of such request, the verdict will not be disturbed, for any point of omission, or otherwise than for error, affirmatively shown.

*Exceptions and Objections.*—The doctrine of exceptions in general, as regards points of detail, will be considered in a subsequent chapter, under the head of New Trial. A few points may, however, be noticed advantageously at the present juncture.

Exceptions, as such, and objections on points of form, or as to the admissibility of evidence, must be taken at once, at the time the objection first arises. If omitted to be so taken, they will afterwards be unavailable. See this subject fully considered, and various cases cited, in the introductory chapter of this book, on trial in general.



Exceptions, when taken, must be direct and specific, or they will be ineffectual for all practical purposes.

A general exception to a charge, containing distinct propositions, is unavailing, unless the party can show that each proposition is erroneous, and to his prejudice. *Haggart v. Morgan*, 1 Seld. 422. See, to the same effect, *Decker v. Mathews*, 5 Sandf. 439, p. 446; *Jones v. Osgood*, 2 Seld. 233; *Stroud v. Frith*, 11 Barb. 300; *Van Kirk v. Wilds*, 11 Barb. 520; *Wager v. Ide*, 14 Barb. 468; *Murray v. Smith*, 1 Duer, 412. Nor is the case altered, by taking the exception to the whole charge, "and to each and every part thereof." So, too, a general exception will be wholly unavailing, where no error of law has been committed, and the whole dispute is on a question of fact, left to the jury. *Meakim v. Anderson*, 11 Barb. 215. An exception to a question put, will not be available, unless material testimony be given in answer to it, embraced within the objection. *Howland v. Willets*, Court of Appeals, 31 Dec. 1853. See 5 Sandf. 219. Where the exceptions taken are of an important nature it will be expedient to apply at the time of the trial for an order, under sec. 265, that they be heard in the first instance at the general term. See this subject hereafter considered, and the cases cited, in a subsequent chapter, under the head of New Trial.

*Calling the Plaintiff, &c.—Voluntary Nonsuit.*—It is no longer necessary that the plaintiff should be called, when the jury return to the bar to deliver their verdict. See Rule 23. The same rule also debars the plaintiff from the right to submit to a nonsuit, after the jury have once gone from the bar to consider their verdict. At any time prior to their retirement he may do so, as under the old practice. The advantages of this course, in the event of a failure of proof, on the part of the plaintiff, are obvious, as, by so doing, his rights, if any, remain available in a fresh action, whilst, in the event of an adverse verdict, the question has become *res adjudicata*.

## § 207. Verdict, and its incidents.

Thus far, the old practice on a trial by jury remains practically unaltered by the code. On the subject of a verdict, how-

ever, the latter contains express provisions, partly in declaration of, and partly in substitution for the former law on the subject.

*Statutory Provisions—General and Special Verdict, Distinction between.*—In the first place, the distinction between general and special verdicts is laid down by sec. 260 as follows:

§ 260. A general verdict is that, by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that, by which the jury find the facts only, leaving the judgment to the court.

*Assessment of Value or Damages. Special Verdict.*—The nature and effect of a special verdict, and the power of a jury to assess the damages of the party prevailing, whether plaintiff or defendant, are next defined as under, by the three following sections.

§ 261. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or, if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained, by reason of the detention, or taking and withholding such property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

§ 262. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

§ 263. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a set-off for the recovery of money is established, beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery, when the court give judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess;

or, if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

The first of these clauses appears, as it stands at present, hopelessly confused, but the erasure of a semicolon, and the substitution of "they" for "and," after the word "thereof" in the 6th line, will render it intelligible, and will doubtless express the meaning of the legislature. The erasure of the word "not," which has been suggested, seems, on the contrary, to increase, rather than obviate the present difficulty.

The power given by sec. 261, to find a general or special verdict, in cases for the recovery of specific real property, is an evident modification of the provisions of the Revised Statutes, as to the verdict in ejectment, in which description of action, a verdict can now be taken, adapted to any peculiar state of the title. *Wood v. Staniels*, 3 C. R. 152.

The trial by jury, of causes primarily triable by the court, seems to be contemplated, in the powers to direct a special verdict in writing, or to give instructions to find upon particular questions of fact, though, of course, both these directions are generally applicable. The difficulties in the way of a trial by jury, of causes of this description seem, however, in most instances, insurmountable, and trial by the court appears the far more expedient course in all. See these views fully enforced in *Alger v. Scoville*, 6 How. 131; 1 C. R. (N. S.) 303; and *Wooden v. Waffle*, 6 How. 145; 1 C. R. (N. S.) 392. The difficulties in the way of interposing an equitable defence to a legal claim, as regards the trial of the issues thus joined, had been previously insisted upon, in *Hill v. McCarthy*, 3 C. R. 49.

It is evident that, however unequivocal the abolition of the distinction between actions at law and suits in equity under sec. 69, some distinction must always exist between cases of a legal, and those of an equitable nature; and that, where legal and equitable principles are in conflict in the same case, substantial justice cannot be done, without a mode of trial, adapted to the due consideration of the latter. See in particular *Wooden v. Waffle*, above referred to, in corroboration of this view, which has already been developed, in the chapter on the general requisites of pleading.

The power of the jury to assess damages, in favor of a defendant prevailing on a set-off, to an amount exceeding the

plaintiff's claim, and those of the court to order judgment accordingly, are made clear by the recent amendment in sec. 263. Similar relief had, however, been previously granted in these cases.

It will be remarked that, in the event of the general verdict of the jury, and their special finding on any particular questions of fact submitted to them being inconsistent, the latter, under sec. 262, is always to prevail.

*Verdict, Subject to Opinion of the Court.*—The former power of the judge to order a verdict to be entered subject to the opinion of the court thereon, which had been swept away by the Codes of 1848 and 1849, is restored by the recent amendment of sec. 264. The ulterior proceedings under these circumstances, will be hereafter considered, in chapter VIII. of the present book, under the head of proceedings by the prevailing party.

### § 208. *Entry and Consequences of Verdict.*

*Entry.*—The mode of procedure, on the return of the jury, prepared to deliver their verdict, is thus prescribed by the earlier portion of sec. 264 :

§ 264. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument, or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict.

*Corrections or Additions, where admissible.*—If the verdict be returned in open court, and in the presence of counsel, and the jury, as is often the case, have fallen into manifest error, the present is the proper period for its correction. By a reconsideration of such errors, under the direction of the judge, much subsequent trouble, and possibly the necessity of a new trial, may be obviated. This observation of course assumes, that the errors in question have arisen from a manifest misapprehension on the part of the jury, as to the extent of their functions, or as to the real nature of the questions submitted to them. If, however, their opinion has been regularly come to, on a

question of fact duly submitted to them, that opinion, however manifestly erroneous, cannot be impeached, otherwise than by means of a new trial. However unsatisfactory it may be, their verdict is conclusive, until such fresh trial, if granted, shall have taken place.

In *Burhaus v. Tibbits*, 7 How. 21, the verdict of the jury was corrected, so as to conform to the facts, and in order to form a complete record on two issues there tried, the one disposed of by the decision of the court, and the other submitted to and passed upon by the jury. Where, however, the slightest doubt exists as to what transpired, or that the whole case has been in fact disposed of, an amendment should not be allowed.

*Supplemental Assessment, in Replevin.*—In actions of replevin, the plaintiff, if he recover less than \$50 damages, should be careful to ask for an assessment of the value of the property recovered, with a view to the purposes of costs, and in order to bring the case within the following clause, forming part of sec. 304:—

“And, in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars. Such value must be determined by the jury, court, or referee, by whom the action is tried.”

*Reservation for further Argument.*—The power to reserve the case “for argument or further consideration,” has formed part of the Code from its original passage, but, strange to say, there is no reported case directly bearing upon its exercise, though, in cases where the judgment to be entered is of a complex nature, and in many others, which it would be superfluous to specify, it is frequently acted upon. Before the last amendment, it might be considered too, as standing in the nature of a substitute for the now restored practice, of entering a verdict subject to the opinion of the court.

*Concluding Observations.*—The total omission in the two former Codes, of any provisions as to the granting of a new trial upon errors of fact, had been the occasion of much doubt and inconvenience. The cases on the subject will be cited, and

the necessary observations made, in chapter VII. of the present portion of the work. For the present, it is only necessary to remark further, in conclusion, that, on the entry of the verdict, the court and jury fees must be paid by the prevailing party. The results of that verdict remain for future consideration. Where, on the delivery of the verdict, it is manifest that a new trial will be moved for, or an appeal taken, a stay of proceedings may at once be applied for, whilst in court, and may probably be granted. The more usual course is, however, to make a subsequent application for that purpose, before the actual entry of the judgment. See this subject hereafter considered, in chapter VII. of the present book.

If any, even the slightest intermeddling or improper interference take place with the jury, during the trial, the verdict will be set aside as of course; and this, whether that intermeddling has or has not been productive of any actual effect. *Reynolds v. Champlain Transportation Company*, 9 How. 7.

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## CHAPTER V.

### TRIAL BY THE COURT.

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#### § 209. *Trial by Court, Nature and incidents of.*

*Where primarily appropriate.*—ALL issues of fact, not properly triable by a jury, [See sections 252 and 254 of Code,] and therefore, as a general rule, the whole class of equitable causes, may be considered as falling within the present category, though, as before remarked, these last may be submitted to a jury, if the parties choose, and have been so, in some few cases.

*By waiver or consent.*—Independent of the above description of cases, which more peculiarly call for the present form of trial, any issues, of whatever nature, may be so brought forward for decision, by consent. The following provisions, as contained in sec. 266, are unequivocal upon this point.

§ 266. Trial by jury may be waived by the several parties to an issue of fact, in actions on contract; and, with the assent of the court, in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

It will be observed that it is only in actions arising out of contract, that this waiver can take place as of course. In others, the assent of the court is necessary; and, in fact, in actions sounding in tort, or where, for any cause, damages require to be assessed, trial by jury is the proper form, and the court may very possibly refuse to dispense with it.

The waiver of trial by jury, by failure to appear, has already been considered, under the head of Inquest and Default. The present observations apply only to cases where an actual trial takes place, or is intended, and it is the desire of the parties that such trial should be had by the court, and not by the jury.

In these cases, it will obviously be most convenient to obtain a written consent, and file it with the clerk beforehand, and then to set down and notice the cause accordingly, upon the Special Term Calendar, or otherwise, as may be the practice in the particular court or district. In the Common Pleas, this mode of setting down the cause is made the subject of special provision, by Rule 7, of June, 1848, and the causes thus set down are to be placed in a separate part of the calendar. The form of waiver by oral consent in open court, seems more peculiarly applicable to those cases in which the parties change their intentions at the last moment, and after the cause has actually been called on, in its order on the circuit or trial term calendar, a case of comparatively infrequent occurrence.

*Course of Trial.*—The general course of the trial before a single judge is practically the same as that before a jury, "*mutatis mutandis*." The case is opened, proved, argued, summed up, and any interlocutory objections or exceptions taken and noted in the same manner, and the general conduct of the cause is identical.

The same restrictions, as to the limitation and duration of the arguments of counsel, are applicable to this mode of trial, as in other cases. See Rules of Court, as noticed in introductory chapter.

*Decision of Court.*]—In the nature, however, of the decisions of the court, and in the mode in which that decision is given, a material distinction exists. The verdict of the jury must be simultaneous with, or, at least, immediately consequent upon the trial of the issue by them. Time for consideration is, on the contrary, given to the court by sec. 267, which runs as follows:

§ 267. Upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk, within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly.

Of course, this power does not exclude the right of the judge who tries the cause, to give an oral opinion at the close of the trial, in case he does not require the time here allowed for deliberation; and, although the question has been mooted, it seems now settled that his oral direction, entered in form upon the clerk's minutes, is a sufficient decision of the cause, and a sufficient authority for the consequent entry of judgment.

In *The People v. Dodge*, 5 How. 47, it was held that the period of twenty days above prescribed, was merely directory; and, the decision in that case having been made by the judge, but accidentally prevented from being filed in due time, it was held that he had power to file such decision afterwards, and that a mandamus might issue to compel him to do so.

The decision of the court, when so reserved, is not analogous to the verdict of a jury, as regards the decease of the plaintiff, subsequent to the actual hearing. In *Ehle v. Moyer*, on the contrary, 8 How. 244, judgment was ordered in such a case, to be entered *nunc pro tunc*, as of the date of the original hearing; the plaintiff having died two days subsequently, and before the decision was pronounced.

In giving a decision of this description, the judge is not bound to set forth, as in a special verdict, all the facts of the case. So far as questions of fact are concerned, he fulfils his duty, by determining the issues which, in his opinion, are material. *Atty. Genl. v. The Mayor of New York*, 12 L. O. 17.

The decision of the judge, in these cases, being usually given in writing, and filed with the clerk, instead of being delivered in the presence of the parties, the taking of exceptions to that decision at the time of its delivery, is necessarily im-



practicable. By section 268, a special power of excepting, on matters of law, is, therefore, given to the parties, if exercised within ten days after notice in writing of such judgment. The decision may also be reviewed on matters of fact, by means of an appeal to the general term, on a case made in the usual manner. See the same section. It is, of course, important, with regard to the above limitation, that the prevailing party should give written notice to his adversary of the judgment pronounced, as soon as he possibly can, after the filing of the decision has come to his knowledge. In no case should this precaution be omitted.

The finding of a judge, upon an issue of fact tried before him, is, in all respects, equivalent to the verdict of a jury upon the same issue, and is to be so treated. See *Osborne v. Marquand*, 1 Sandf. 457; *Gilbert v. Luce*, 11 Barb. 91; *Masters v. Madison County Mutual Insurance Company*, 11 Barb. 624, (p. 633.) It is therefore conclusive, unless the weight of evidence against it be so great, that a verdict under similar circumstances would be set aside. See, likewise, *Adsit v. Wilson*, 7 How. 64, in relation to a justice's decision under similar circumstances.

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## CHAPTER VI.

### TRIAL, OR HEARING BY REFEREES.

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#### § 210. *General Characteristics.*

*Two Forms of Reference.*—References under the Code are classifiable into two grand divisions; viz.: 1. References of the whole issue, 2. Interlocutory or consequential references. The latter bear more the character of one to the master, under the old chancery practice, the former that of a trial by the court. This distinction is clearly laid down in *Graves v. Blanchard*, 4 How. 300, 3 C. R. 25, in the following terms: "A referee, under the Code, is not merely a substitute for the master under the former practice, but is clothed with the power of a judge at special term. When a specific question is referred to him,

his office resembles that of a master; when the whole issue is referred to him, he takes the place of the court; his report thereon stands as its decision, and may be reviewed in like manner."

Wide though the distinction be, between these two classes of references, separately considered, the general form of proceeding in both is, in many respects, analogous. In both, the general form of proceeding, viz., the appointment to attend before the referee, the course of proof and argument before him, and the nature and form of the report to be made, present the same general characteristics. To treat both separately would involve much needless repetition, whilst, on the other hand, any minor distinctions are easy to be noticed, in commenting on both, in connection with each other. This course has, accordingly, been adopted.

Though selected by the parties, a referee cannot act until regularly appointed by the court; and, if he assume to do so, before his regular appointment has taken place, all his acts will, as of course, be a nullity. *Litchfield v. Burwell*, 5 How. 341, 1 C. R. (N. S.) 42, 9 L. O. 182.

The granting of references, and under what circumstances this course of proceeding will or will not be appropriate, have been already considered in preceding portions of the work, in connection with the subject of motions for a reference, 1st. By way of accelerating the cause, and 2dly. At the actual trial. The circumstances under which a consequential reference will be the appropriate form of procedure, will be hereafter considered in chap IV. of the succeeding book. The powers and duties of referees, and the mode of proceeding before them, when duly appointed, will form the subject of the present.

A reference to report as to facts, for the information of the court, is usually to one party only, of the judge's selection, (see *Conway v. Hitchins*, 9 Barb. 378, as to his powers in this respect); those of the whole issue are, on the contrary, more ordinarily made to three, chosen by the parties, or appointed by the court, under the powers in sec. 273. In neither case, however, is the rule imperative. References of the latter nature are frequently made to a single party: whilst, in those of the former description, three are occasionally, though more rarely nominated. The question as to the nomination and selection of referees, has been already considered, and the different cases

cited, in chapter II. of book VIII., under the head of Motion for a Reference.

### § 211. *Provisions of Code, Powers of Referees.*

*Statutory Provisions.*]—The proceedings considered in this chapter, are regulated by sec. 272 of the Code, in which the distinction above drawn between the two different classes of reference is clearly recognized. It runs as follows :

§ 272. The trial by referees is conducted in the same manner, and on a similar notice, as a trial by the court. They have the same power to grant adjournments as the court, upon such trial. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner, but not otherwise ; and they may, in like manner, settle a case or exceptions. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon, in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict.

In a subsequent portion of the Code, chap. XIV., title XII. of part II., sec. 421, the powers of referees are thus further declared :

§ 421. Every referee, appointed pursuant to this act, shall have power to administer oaths, in any proceeding before him, and shall have generally the powers now vested in a referee by law.

*Practice under Code before last Amendment.*—*Powers of Referees as to Costs, &c.*]—The mode of trial before the referees when appointed, and the effect of their report upon an interlocutory reference, both which important points had been left totally unprovided for in the measures of 1848 and 1849, are, for the first time, prescribed by the recent amendments. The courts had however, been already feeling their way to the conclusions come to by the legislature.

All the cases under the late measures, agreed, in fact, in treating the form of trial before referees of the whole issue, as being substantially the same as that on a trial by the court. Thus, in *Langley v. Hickman*, 1 Sandf. 681, the court refused to entertain an application to postpone a trial before referees, on

account of the non-attendance of a witness, on the ground that such postponement was a matter peculiarly within the province of the referees themselves. Their right to refuse to hear further testimony upon any particular point, on which sufficient evidence has already been given, is also laid down in *Green v. Brown*, 3 Barb. 119. In *Schermerhorn v. Develin*, 1 C. R. 28, the court, on similar principles, refused to interfere with the discretion of the referee as to the admission or rejection of evidence, even though its opinion was sought to be obtained at the latter's own request; and, in *Allen v. Way*, 7 Barb. 585, 3 C. R. 243, it was held that the referee was bound by the same rules in proceedings before him, as the court, upon the trial of a cause. It was accordingly laid down, that it is not competent for such referee to admit objectionable evidence at the time "*de bene esse*," and afterwards to reject it in forming his decision. His discretion over such interlocutory questions ceased with his decision of them, or, at least, with the actual trial of the case before him. He could not review his decision on such questions afterwards, in the absence of the parties. In *Graves v. Blanchard*, 4 How. 300, 3 C. R. 25, before cited, the same general authority is laid down as above mentioned, in distinct terms, and the right of a referee of the whole issue to pass upon the question of costs, distinctly asserted. This last power was doubted in *Van Valkenburgh v. Allendorph*, 4 How. 39, but on apparently unsatisfactory grounds, whilst, in *Ludington v. Tuft*, 10 Barb. 447, the authority of *Graves v. Blanchard* is expressly confirmed, and it is held that the decision of the referee in this respect, will not be supervised by the general term, unless for manifest error.

In *Goubl v. Chapin*, 4 How. 185, 2 C. R. 107, and *Howe v. Muir*, 4 How. 252, it was, however, held that a referee had no power to pass in any shape, upon the question as to whether an extra allowance ought or ought not to be granted, under sec. 308. This conclusion seems, however, to be unsustainable to its full extent. Under rule 82, the application for this purpose can only be made "to the court before which the trial is had, or the judgment rendered," and the decisions in reference to that allowance, are almost all to the effect, that the application for that purpose ought to be made to the judge who has actually tried the cause; for the obvious reason that he, and he alone, is competent to form a judgment as to the propriety of

that application, without what would amount to a fresh hearing of the case. The reasoning in *Graves v. Blanchard*, above cited, on the analogous question of granting or refusing costs, where they rest in the discretion of the court, is, indeed, directly opposed to this conclusion, and the fact that the report of the referees upon the whole issue is, by express provision, to stand as the decision of the court, and that judgment may be entered thereon as of course, without any further action on the part of the delegating tribunal, seems almost, if not entirely, decisive as to their full power, at least to certify their opinion, if not to deal with all minor and subsidiary questions, during and consequent upon the actual hearing. The proper course seems to be that pointed out in *Fox v. Gould*, 5 How. 278, 3 C. R. 209, viz., to obtain the referee's certificate upon the facts, and then to apply to the court upon that certificate.

*Powers of Referees continued.*]—Under sec. 421, above cited, it is provided, that a referee, under the Code, "shall have generally the powers now vested in a referee by law." These powers will be found prescribed in article IV. title VI. chapter VI. of part III. of the Revised Statutes; 2 R. S. 383 to 386. The oath to be taken by such referees, previous to hearing testimony, is prescribed by sec. 44 of that article; and the party having the carriage of the reference, should, of course, see that this condition precedent has been properly complied with.

This last provision seems, however, to be only applicable to references of the whole issue, and not to those of an interlocutory nature. It may be convenient to draw the reader's attention to the enactments at 2 R. S. 88 to 91, with respect to the reference of claims against the estate of a deceased person, disputed by the executors; although the consideration of references of this last description, in no respect falls within the plan of the present work.

The powers of a referee of an issue of fact being substantially the same as those of a jury, on the trial of a similar issue, the general rules of law as to the conduct and duties of jurors, under such circumstances, are equally applicable to them. Thus, in *Yule v. Gwinits*, 4 How. 253, a referee's report was set aside for irregularity, in consequence of his having examined some machinery there in question, in company with two of the plaintiff's witnesses, and of his having received explanations from

such witnesses, without the knowledge or consent of the defendants; and this, although there seemed no reason to doubt his perfect good faith in the matter, and his perfect unconsciousness of any impropriety or irregularity in that line of conduct.

In *Dorlon v. Lewis*, 9 How. 1, the same principles are fully maintained, and it is held that, if it appears that the report of a referee upon questions of fact has been, even in the slightest degree, affected by any influence exercised by the successful party, it will be set aside for irregularity. A referee, when the cause is intrusted to him, should not only avoid all improper influences, but even the appearance of evil, and, whether satisfied with his decision or not, no one should be left to question its entire fairness.

The office of the referees being in its nature judicial, they cannot testify, under any circumstances, in the course of the proceedings pending before them. *Morss v. Morss*, 11 Barb. 510, 1 C. R. (N. S.) 374, 10 L. O. 151.

Any defect in the original appointment of a referee, will be waived by the parties proceeding before him without objection; and, having done so, they will not be permitted to raise such objection afterwards. *Renouil v. Harris*, 2 Sandf. 641; 1 C. R. 125. The same doctrine was also held by the court in *Garcie v. Sheldon*, 3 Barb. 232, save only as regards the point that the court had no jurisdiction to make the order of reference. That objection may be raised at any time.

A reference "of this cause," without limitation, embraces all the issues, both of law or fact, therein, and the referees will have power to report upon the whole of such issues. *Renouil v. Harris*, 1 C. R. 125, 2 Sandf. 641, above cited. See also *Graves v. Blanchard*, 4 How. 300, 3 C. R. 25, before referred to.

A rule of court, by consent, referring to referees, "to hear and determine the matters in controversy on legal and equitable principles," was, however, held, in *Blunt v. Whitney*, 3 Sandf. 4, to be, not a reference, but an arbitration; and a motion to set aside the report made, was accordingly dismissed for want of jurisdiction. The decision of questions by arbitration, is entirely and exclusively a proceeding under the old practice, and is in no manner affected by the Code, or any of the decisions under it.

On the granting of a new trial, on a referee's report, the same referee may proceed in the matter without any fresh authority

from the court. The effect of the proceeding is, to replace the cause in the position in which it was before the first trial, the order of reference remaining in full force. *Shuart v. Taylor*, 7 How. 251.

### § 212. *Course of Hearing.*

Though, in all substantial respects, similar to a trial by the court, the trial by referees is usually of more irregular continuance, and of longer duration. When once commenced, a trial by the court is usually carried on to its conclusion, as a consecutive proceeding, without any postponement or adjournment, save such as are absolutely and indispensably necessary, and then only "*de die in diem*." The trial before referees is, on the contrary, rarely so disposed of. It is, ordinarily, adjourned and resumed from time to time, at irregular and arbitrary intervals, according to the convenience of the parties or of the referees, and is, in consequence, frequently spread over a comparatively prolonged period.

The provisions of the Revised Statutes, in the article above cited, remain, for the most part, practically unrepealed, and the mode of conducting the proceedings before referees is, in all essential respects, the same as under the old practice. The works on that practice may therefore, if necessary, be referred to for points of detail, according to the plan laid down at the commencement of this work. A sketch, however, of those proceedings may be useful at this juncture.

*Notification to Referees—Their Duty thereupon.*]—Of course, the first proceeding to be taken by the party having the conduct of the reference, is to notify the referees of their appointment, for which purpose, a copy of the order should be served upon each. On receiving such notification, they must proceed with diligence to hear and decide the matters in controversy, (see sec. 42 of the article of the Revised Statutes above cited,) and they have power to make use of the process of the court, in order to enforce the attendance of the witnesses before them, ss. 44 and 45.

They are bound to appoint a time and place for the hearing, and should do so in writing, though it has been held that a parol appointment is sufficient. See *Stephens v. Strong*, 8 How..

339. They have full powers of adjournment of that hearing, from time to time, and, on the application of either party, and for good cause shown, they may postpone it to a time, not extending beyond the next term of the court in which the suit is pending; sec. 43. This power is extended by the Code, as above cited, and is now the same as that of the court, under similar circumstances.

Any one referee may administer an oath, but all must meet together, and hear all the proofs and allegations of the parties, and an adjournment cannot be granted, except by the full number; any two, however, may make a report; sec. 46. The referees may be compelled by order to proceed, and to report on the matter submitted to them, and the court may require them to report any proceeding before them, and their reasons for allowing or disallowing any claim, if necessary; sec. 47. In references consequent upon judgment, in an action for an account, they may examine the parties upon oath, and may require the production of books, papers, or documents, in the custody, or under the control, of either, and, in case of refusal, report the same to the court, which will thereupon proceed to enforce such production, by the ordinary process of attachment; ss. 55 to 59.

*Production of Books, &c.*—In other cases, they have no power to order the production of books and papers, where there is no provision to that effect in the order of reference. The power to order such production is limited to the court, or to a justice thereof. The certificate of a referee that the production of books and papers is necessary, will, however, be regarded as presumptively sufficient to warrant an order for their production, and the burden of showing the contrary will, in such case, lie on the adverse party. *Fraser v. Phelps*, 3 Sandf. 741, 1 C. R. (N. S.) 214. Care should, therefore, be taken, to have a direction to the foregoing effect inserted in the original order, in all cases where such production is likely to be required.

The court will grant to the referees a special power of this nature, as of course, in all cases in which a reference to the master would have been proper, under the old chancery practice. *Fraser v. Phelps*, 4 Sandf. 682. They will then be competent to make such an order of their own authority, and the question as to the propriety of the order so made, will then



come before the court, on the motion to show cause why an attachment should not issue, in the event of its being disobeyed by the parties.

The above course of proceeding is proper, when, as before stated, the necessity of such production is foreseen, when the reference is originally granted. If that necessity arise subsequently, the obtaining a certificate, as above, and an application to the court, grounded thereon, will be requisite. In case of a refusal to produce, a special application to the court appears then to be the only course.

Referees have no power, of their own authority, to issue process of contempt; nor can they make any order of that nature, such as to order the complaint of a plaintiff to be stricken out, on his fraudulent refusal to produce papers material to the defendant's case, on a *subpœna duces tecum*. *Bonesteel v. Lynde*, 8 How. 226, affirmed, 8 How. 352.

*Notice to adverse Party.*]—Due notice should be given to the opposite party, of the original appointment for hearing by the referee, and of each adjournment, when such party is not present, at the time when that adjournment takes place.

No time is positively prescribed, but at least the same notice ought to be given of the first hearing, as on the case being tried by the court. See *Williams v. Sage*, 1 C. R. (N. S.) 358.

This seems, indeed, to follow, as a natural consequence, from the provision in s. 272, as it now stands, that this description of trial is to be conducted, in the same manner, *and on similar notice*, as a trial by the court. This view is taken, and the right of either party to bring on the case on such notice is recognized, in *Thompson v. Krider*, 8 How. 248. Once noticed, the proceeding assumes the form of a pending trial, and no fee in the nature of a term fee can be claimed, although a renewed notice may be given, after an adjournment has taken place. See *Anon.*, 1 Duer, 596; 8 How. 82, overruling *Benton v. Bugnall*, 1 C. R. (N. S.) 229.

*Course on Trial—General Observations.*]—On the reference coming on in due course, the form of proceeding is the same, "*mutatis mutandis*," as on an ordinary trial; the case is regularly opened, proved, and summed up, at the meeting or meetings, in proper form, and in a consecutive manner. All inter-

locutory points should be decided at the time, and exceptions to such decisions may be taken, and should be noted precisely as in the case of trial by the court. See *Deming v. Post*, 1 C. R. 121.

The referees, in fact, stand in the place of the single judge, for all purposes; and all that must, or may be done before or by such judge, during the hearing, ought, in regularity, to be also done before or by them. Under the Code of 1849, it was held that a referee, in the proceedings before him, is bound by the same rules as to the admission or rejection of evidence, as a judge upon the trial of a cause. He cannot admit such evidence *de bene esse* at the time, and afterwards state that he has rejected it in forming his decision. "His discretion, as well as his authority over interlocutory questions, arising in the course of the trial, ceases with his decision of them, or at least with the trial itself." He cannot review his decision on them afterwards, in the absence of the parties. *Allen v. Way*, 7 Barb. 585, 3 C. R. 243, above cited. This principle is fully carried out by the late amendment. See, likewise, *Langley v. Hickman*, *Green v. Brown*, *Schermerhorn v. Develin*, and *Graves v. Blanchard*, before cited.

*Divorce.*—The practice in references for a divorce, on the ground of adultery, is laid down in *Arborgast v. Arborgast*, 8 How. 297. All facts material to the plaintiff's right to a decree must be fully proved, or it cannot be obtained; nor can the testimony of the defendant be made use of in any manner for such purpose.

*Accounting.*—Where an account is directed to be taken, the former rules of practice of the court of chancery are still in full force. Where, therefore, the account of a defendant is directed to be taken in the "usual manner," it was held that he was bound to bring in before the referee a sworn account, including both debits and credits, in the manner prescribed in the 107th Rule of the late court of chancery, and to submit to such examination as was allowed by that rule. *Wiggins v. Gaus*, 4 Sandf. 646. The rule in question will be found, *in extenso*, in a note at the end of the case in question, 4 Sandf. 649.

Where, however, the pleadings in the cause presented a preliminary issue, as to the existence or non-existence of an

alleged partnership, a special report by the referee, with a view to the decision of that question in the first instance, before proceeding to take the accounts, which would be consequent on the referee's decision in the affirmative being supported, was held to be undoubtedly the correct practice. *Bantes v. Brady*, 8 How. 216.

*Nonsuit or Default.*—By Rule 22 of the Supreme Court, it is specially provided that, at the hearing, the plaintiff may submit to a nonsuit or dismissal of his complaint, or be nonsuited; or his complaint may be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision; in which case, the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

In the rules, as they stood previous to the last amendment, the provision above made for a dismissal had been omitted.

That the defendant might obtain an adverse nonsuit, in the event of the plaintiff failing to prove his case at the hearing, has always been clear. See *Brockway v. Burnap*, 12 Barb. 347; 8 How. 188.

The course to be pursued, in the event of the plaintiff's neglect to proceed with the cause before the referee, has given rise to more discussion. In *Holmes v. Slocum*, 6 How. 217, 1 C. R. (N. S.) 380, it was held that, under these circumstances, the defendant cannot take a report that he is entitled to a dismissal of the complaint, and enter up judgment on that report, as of course. This view proceeds on the assumption that the referee had no power, under the Code as it then stood, except to hear and decide the issue; and that the proper course, under these circumstances, would be a motion to dismiss the complaint for unreasonable delay, under Rule 43 of the late rules of the Supreme Court.

In *Williams v. Sage*, 1 C. R. (N. S.) 358, a precisely contrary conclusion is come to, and a motion to dismiss for unreasonable delay was denied; the court holding that either party may notice an action for trial before referees, and proceed upon that notice, precisely as on trial by the court; and that the referee, in that case, should have proceeded upon the defendant's notice, and, in the absence of evidence on the part of the plaintiff, reported in favor of the former.

This latter conclusion is supported by the subsequent decisions of *Thompson v. Krider*, 8 How. 248; and *Stephens v. Strong*, 8 How. 339; and the point may, therefore, be looked upon as settled accordingly. It seems clearly deducible indeed, from the language of Rule 22, as now amended.

It is further supported by the case of *Salter v. Malcolm*, 1 Duer, 596, which holds that, under these circumstances, the proper judgment to be entered is a dismissal of the complaint, and not an absolute judgment, as upon verdict. The judgment ought no more to be an absolute bar in such a case, than in that of a nonsuit upon a trial.

*Postponement of Trial, Costs of.*—By sec. 314, referees are clothed with special power to impose the payment of costs not exceeding ten dollars, as the condition of granting any postponement of a trial, when applied for.

### § 213. *Report, &c.*

The trial, or hearing before the referees having been brought to a conclusion, their report must then be made. Any two, as above stated, are competent to make that report, though all must be present at the actual hearing. Where any time is prescribed in the order of the court, within which the report must be made, that direction must of course be strictly complied with; as, otherwise, the referees' authority, unless subsequently extended, will be gone, and their subsequent proceedings invalid. An extension of this nature, if requisite, must be applied for by motion, upon notice, in the usual manner, the facts under which that extension is sought being shown, and the absence of *laches* proved, by affidavit, in the usual manner; or, if procurable, the order may be entered on consent. The objection, too, seems one which would be effectually waived, by the acquiescence of the adverse party, or even by his appearance upon any proceeding, after the lapse of the time originally prescribed, without objection made at the time, and persevered in.

*Fees of Referees.*—The referees themselves draw their report, and their fees must be paid by the prevailing party, on taking it up. These fees are fixed by sec. 313, at three dollars to each

referee, for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation.

It has been held in *Richards v. Allen*, 11 L. O. 159, that the referee can only properly deliver the report to the successful party; and the defendant in that case, having taken up a report in favor of the plaintiff, was ordered to file it within five days, in default whereof, the referee was directed to deliver a new report to the plaintiff, on payment of any fees remaining due.

It seems from *Lamoureux v. Morris*, 4 How. 245, that the attorney in a proceeding, is not personally liable to a referee for the payment of his fees. See *Howell v. Kinney*, 1 How. 105. The latter may, however, practically enforce their payment, by refusing to deliver over their report, until they are duly satisfied.

*Form of Report.*—By sec. 272, as it now stands, the form of the report is distinctly prescribed. "It must state the facts found, and the conclusions of law, separately." The unsuccessful party has a right to have these placed upon the record; and to have all material issues passed upon. See *Church v. Erben*, 4 Sandf. 691; *Van Steenburgh v. Hoffman*, 7 How. 492.

This last amendment is in accordance with the general principle of the rule (No. 13) previously made by the Superior Court, by which it is provided as follows: viz.,

"The party who moves for a rehearing or review of a cause or matter decided by a referee or referees, shall procure and furnish to the court a special report of the referee or referees, setting forth distinctly the facts found on the reference, and his or their decision upon the points of law arising in the cause." See *Church v. Erben*, 4 Sandf. 691.

It is true that the proceeding by rehearing is no longer applicable, except to interlocutory or consequential reports, but the general principle involved, is the same, viz.: that the unsuccessful party is entitled to have the whole case placed upon the record, in order to his right to review the decision, by appeal, or otherwise, according to the circumstances.

The Codes of 1848 and 1849, contained no directions of this nature, but the decisions under those Codes had previously laid down the same principles. Thus, it was held that a referee, in

his report, *must* set out the facts proved by the evidence before him, and his conclusion of law upon those facts; and he may also report the evidence. If he omit to do this, his report will be irregular, and, with the proceedings under it, will be set aside. *Doke v. Peek*, 1 C. R. 54. It is also laid down, that the report is "to contain the facts found, and the conclusions of law thereon, in *Mucklethwaite v. Weiser*, 1 C. R. 61, and to the same effect, in *Deming v. Post*, 1 C. R. 121. Reports of the mere sum due, without finding the facts, were accordingly set aside in the first and last of those cases. Although, where necessary, the referee may report the evidence in addition, he must, in all cases, report the facts, and he is not at liberty to report the former alone, without the latter. *Dorr v. Noxon*, 5 How. 29. In preparing his report, the referee cannot review his interlocutory decisions during the progress of the cause, nor can he, in forming his conclusion, reject evidence which he has admitted "*de bene esse*" during the progress of the hearing. See *Allen v. Way*, 7 Barb. 585, 3 C. R. 243, before cited.

In *Bantes v. Brady*, 8 How. 216, where a general reference had been made, involving an issue, in the first instance, as to the existence of an alleged partnership, a special report by the referee, upon that specific question, with a view to its decision in the first instance, without proceeding to take accounts which would be consequent on the referee's conclusion in the affirmative, was held to be the correct practice.

If a report, generally regular, be defective in not reporting on some one particular issue, it seems that it may be amended almost as of course. See *Renouil v. Harris*, 2 Sandf. 641; 1 C. R. 125.

A motion, upon the usual notice, is the proper course to pursue, for the purpose of obtaining corrections of this nature, which may be grounded either on the previous pleadings and proceedings, when the defect is apparent upon their face, or upon affidavit, where that defect requires to be extraneously shown.

An application of a similar nature is doubtless admissible, where the adverse party complains of an insufficient or erroneous statement of the facts, by a referee, in his report, under the present provisions of the Code. With a view to such an application, however, the precise defect, and its detrimental influence on the case of the applicant, and also the real facts

required to be stated, must be clearly and distinctly proved, and pointed out, as, otherwise, the application will be necessarily unavailing.

*Conclusiveness of Report.*—It appears from the case of *Watkins v. Stevens*, 4 Barb. 168, that the report of referees, like the verdict of a jury, is, as a general rule, conclusive in a case of conflict of evidence, so far as regards the questions of fact passed upon, unless some principle of law has been violated. See also *Green v. Brown*, 3 Barb. 119, and *Baker v. Martin*, 3 Barb. 634; *Spencer v. The Utica and Schenectady R. R. Company*, 5 Barb. 337; *Camp v. Pulver*, Ibid. 91; *Quackenbush v. Ehle*; Ibid. 469; *Durkee v. Mott*, 8 Barb. 423, and *Hayes v. Symonds*, 9 Barb. 260; *Ludington v. Taft*, 10 Barb. 447; *Kemeys v. Richards*, 11 Barb. 312; *Orchard v. Cross*, 12 Barb. 294; *Lockwood v. Thorne*, 12 Barb. 487; *Shuart v. Taylor*, 7 How. 251; *Dobson v. Tracey*, *Morris v. Husson*, *McKnight v. Chauncey*, Court of Appeals, 12th April, 1853; *Bearss v. Copley*, Court of Appeals, 18th April, 1854; *Dorlon v. Lewis*, 9 How. 1; *Doubleday v. Newton*, 9 How. 71.

Nor will such a report be set aside for unimportant mistakes. The error complained of, must be a clear and decisive error, by which the party objecting to it has been injured. *Ludington v. Taft*, above cited. A report, too, may be upheld, although some testimony may have been improperly admitted, if, rejecting that testimony, enough remains to sustain it. *Kemeys v. Richards*, also above referred to.

The rule, that the decision of a referee stands on the same footing as the verdict of a jury, is, however, subject to some qualification. Thus, in *Scranton v. Baxter*, 4 Sandf. 5, it is held that this rule is only applicable, when the grounds of the report are explicitly stated by the referee, or, from the nature of the controversy, are apparent upon the face of the report. When, on the contrary, the cause involves distinct and alternative questions of law and of fact, and the report is general, the court must necessarily act on the free exercise of its own judgment, both as to the law and the evidence. The report in that case was accordingly set aside, on motion, that course being admissible at the time the decision was made.

A similar conclusion was come to in *Vansteenburgh v. Hoffman*, 15 Barb. 28, on the review of a report, by appeal, as now

provided. It was held, that a review of this description was analogous to a motion, under the former practice, to set aside the report as against evidence. The court will not disturb the finding, on a difference of opinion on the weight of testimony; but, if there is an absence of evidence, or so great a preponderance against the finding as to indicate prejudice, partiality, or corruption, the court will interfere. See, also, *Green v. Brown*, and *Quackenbush v. Ehle*, above cited.

In *Burhaus v. Van Zandt*, 7 Barb. 91, it was held that, in equity cases, the rule as to the conclusiveness of a referee's report did not prevail, and that such a report was like the report of a master, or the decision of a vice-chancellor, upon any matter referred; where, upon exceptions or appeal, all questions decided, whether of fact or of law, were the subjects of review. The finding of the referee in that case was, however, maintained, and affirmed by the Court of Appeals, 30th December, 1852.

The same principles, as to the exercise of improper influence, apply to the report of referees, as to the verdict of a jury. When, therefore, there is even the shadow of an imputation of this kind, and even though bad faith be not actually imputed, the report will be set aside. See *Dorlon v. Lewis*, 9 How. 1; *Yale v. Gwinits*, 4 How. 253.

*Review of Report.*—The review of a report on the whole issue, since the last amendment, can only be had on appeal from the judgment, entered upon it; and not at special term, as previously allowable. *Simmons v. Johnson*, 6 How. 489; *Church v. Rhodes*, 6 How. 281; *Watson v. Scriven*, 7 How. 9. See, however, *Goulard v. Castillon*, 12 Barb. 126, in relation to courts of limited jurisdiction, and laying down that, when the report is sent back to the referees for revision, and they go beyond the correction of the errors for which it is so sent back, and reopen the case as to other items, they are bound to hear additional testimony, if offered. See this subject hereafter more fully considered under the heads of New Trial and Appeals.

*Entry of Judgment.*—Under the Codes of 1848 and 1849, in which no express provision was made on the subject, it was doubted whether judgment could or could not be entered upon



the report of referees upon the whole issue, without any further direction by the court. In *Clark v. Andrews*, 1 C. R. 4, and *Deming v. Post*, 1 C. R. 121, it was held that it was necessary to obtain such direction. In *Renouil v. Harris*, 2 Sandf. 641, 1 C. R. 125, the contrary was maintained; and the practice was settled accordingly, by Rule 22, which provides that, on filing such a report, judgment may be entered as a matter of course. This provision is further carried out by the last amendment of section 272. See this subject hereafter considered under the head of Judgment. Where, however, the report is in anywise of a partial or incomplete nature, the entry of judgment, with directions for a consequential reference, will be inadmissible; and the report, where not purely interlocutory, must, on the contrary, be confirmed in the first instance, and application then made upon it, as in the case of those mentioned in the next section. See *Bantes v. Brady*, 8 How. 216, above cited.

#### § 214. *Interlocutory or consequential Reports—Confirmation of.*

Where the report is of a purely interlocutory nature, and its object merely to report facts for the information of the court, before the hearing of the cause, or with a view to some purely interlocutory proceeding, a formal order of confirmation does not seem to be necessary, but action may be taken on such a report, by motion, on its mere production to the court. Where, however, that report is of such a nature, as that exceptions can properly be taken to the decisions of the referee, pending the proceedings before him, the rule is otherwise, and in all cases, where there is any doubt upon the subject, the precaution of a formal confirmation should not be neglected.

Reports falling under this latter category, including, as a general rule, all reports consequential upon the actual hearing, and with a view to the proper pronouncing of judgment, or subsequent to that judgment, must, in all cases, be confirmed, before any further action can be taken upon them. "If the reference be made on the hearing, or on further directions, then the practice is, upon filing the report, to enter an order of course to confirm it, unless cause be shown in eight days after service of notice of that order. But, when the report is the

consequence of an order made on the motion or petition, the confirmation can only be had by special motion, or on petition." *Griffing v. Slate*, 5 How. 205, 3 C. R. 213. An order for leave to prosecute an undertaking, given on the granting of an injunction subsequently dissolved, was accordingly refused in that case, on the ground that the application could not be made, until the referee's report on the amount of damages had first been confirmed on a special motion. In *Swarthout v. Curtis*, 4 Com. 415, 5 How. 198, 3 C. R. 215, the referee's report of the amount due, under a decree of foreclosure, was confirmed at special term, by default, on a regular notice of motion, and this confirmation was held to be good, as it doubtless was. On the principle laid down in *Griffing v. Slate*, however, the usual order of course would have been sufficient. This order should be precisely in the words there given, and is in all respects the same as that under the former practice. See form in Appendix. It must, of course, be duly served upon all parties, and that forthwith, or the proceeding may become voidable. See *Buntes v. Brady*, above cited, as to the necessity of confirming a partial report, though made under a reference of the whole issue. See, also, as to confirmation, *Belmont v. Smith*, 1 Duer, 675, 11 L. O. 216.

*Review of.*]—As the interlocutory or supplementary reports of referees require confirmation, before any action can be taken upon them; so also are they reviewable by the court, in all cases. It is, as will be seen, provided that they have "the effect of a special verdict." The mode of obtaining such review, as regards the description of reports last referred to, is "by special motion on notice, in the ordinary form, on the face of which, the objections taken should in all cases be shown."

In the Superior Court, special provision is made, by Rule 13 of that tribunal, as above cited, that a party, desiring a review of this description, must, in the first instance, obtain a special report from the referee, setting forth the facts of the case, and his decision thereon. In *Belmont v. Smith*, 1 Duer, 675, 11 L. O. 216, above cited, it was held that, on a motion to set aside a report of this nature, a special report must be obtained, as above prescribed, and that an affidavit of the proceedings before the referee cannot be used.

It seems more than questionable, however, whether this

practice is imperative, in the other tribunals, and whether the adduction of affidavits, is not clearly admissible, if not the proper mode of bringing forward a motion of this description. On the other hand, the obtaining a special report will, in many, if not most instances, be a highly convenient course, as tending to save the time, both of the court, and of the parties.

On applying for such a special report, the attention of the referees should, of course, be directed to the precise points in controversy, in order that they may make their report full and explicit, and sufficient for the due information of the court, on those particular questions. In most cases, the observance of this precaution will narrow and simplify the discussion on the hearing of the application, and render unnecessary the introduction of any extraneous matter.

When exceptions are filed to an interlocutory report, they must be disposed of on the motion to review, and not by way of appeal, as from a judgment, and they are subject to the ordinary rule, that no objections can be so raised, if not taken before the referee at the actual hearing. *Belmont v. Smith*, above cited.

*Course on Review, if Granted.*—If the order to review be granted, and, as is usual in such cases, the matter be referred back to the same referee to review his report, the proceedings before him, in relation to such review, will, of course, be conducted precisely on the same footing as those on the original reference, and his further report must be obtained and acted upon precisely in the same manner.

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## CHAPTER VII.

### MOTION FOR NEW TRIAL—PROCEEDINGS BETWEEN TRIAL AND JUDGMENT.

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#### § 215. *Course of unsuccessful party in relation to Review.*

*General Remarks.*—If dissatisfied with the verdict of the jury, or the decision of the court or referees, it is always open to the losing party to apply for a review of that decision. If

such review be sought on alleged error in point of law, an appeal upon exceptions is the more ordinary form of obtaining it; if, on the contrary, the decision of the issue of fact be complained of, the making of a case is the usual course. Under the amendment of 1851, the former practice of moving for a new trial upon the judge's minutes, abolished by the previous measures, is restored. These different forms of proceeding will, accordingly, be considered, *seriatim*, in inverse order. The review of a referee's report on the whole issue, being obtainable on a case made, will be considered in connection with that branch of the subject.

*Statutory Provisions.*—In the Codes of 1848 and 1849, the subject of new trial in jury cases was left totally unprovided for, the only notice of that subject being under the head of trial by the court. This omission gave rise to much discussion, and to many doubtful, and, in some cases, conflicting decisions, with regard to the power and mode of reviewing an erroneous verdict on a question of fact. The omission is, however, now attempted to be remedied by the amendments in sections 264 and 265.

In the measure of 1851, these amendments were made at considerable length. On the last revision, the clauses so inserted have been completely remodelled, and now stand as follows:

§ 264. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the rules of the court, and then stated in writing in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. If the exceptions be, in the first instance, stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. The judge who tries the cause, may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict, and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such

motions in actions hereafter tried, is heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case of exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

§ 265. A motion for a new trial, on a case, or exceptions, or otherwise, and application for judgment on a special verdict, or case reserved for argument or further consideration, must, in the first instance, be heard and decided at the circuit or special term, except that, when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, and the judgment in the mean time suspended; and in that case, they must be there heard in the first instance, and judgment there given. And where, upon a trial, the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at a general term; and in that case, the application for judgment must be made at the general term.

A small portion of these sections refers to the reservation of cases for argument or further consideration, or to a verdict taken subject to the opinion of the court, proceedings, in which the plaintiff is the moving party, and which will accordingly be considered in the next chapter.

It will be observed that, by the last amendment, the ancient nomenclature and distinctive form of the bill of exceptions are abolished, and a statement in writing, differing but little from a case, for a review on the facts, in the usual form, is substituted in its stead.

### § 216. *Stay of Proceedings.*

Whatever the course of proceeding adopted by him, the first measure advisable on behalf of a party dissatisfied with the decision pronounced, will be to obtain a general stay of his adversary's proceedings. In *Bull v. The Syracuse and Utica Plank Company*, 6 How. 198, 1 C. R. (N. S.) 410, it was even held, that a new trial could not be granted at all, under the Code of 1849, unless the case were reserved for argument, or unless such an order were obtained, within the four days, after which, under that measure, the order would otherwise become final. See also Rule 8 of Superior Court, below cited. Though the restriction of 1849, under which the judgment became final

after the above period, unless the contrary was provided for, no longer exists; the application should, in all cases, be made at once, and, if possible, to the judge who tried the cause, either at the trial, for a special direction to that effect, (which seems to be contemplated by the last amendment,) or, at all events, as soon after as possible. In this case, no additional evidence whatever will be necessary. The motion may, on the contrary, be made *ex parte*, grounded on the judge's personal knowledge of the facts, which have been so recently before him. Unless the proceeding be palpably frivolous or dilatory, the granting of a stay of this nature is almost as of course. The power of the judge in this respect, was clearly asserted, in the case of *Livingston v. Miller*, 1 C. R. 117. The subject has been already fully considered in Book IV., under the head of formal proceedings; see that chapter, and the cases there cited.

Where the trial has been by jury, and exceptions have been taken, and those exceptions are directed by the judge to be first heard at the General Term, under the special power given for that purpose in sec. 265, such direction, of itself, effects a stay until that hearing has taken place, and no further order will be necessary under these peculiar circumstances.

Prior to the recent amendments, the stay usually applied for was, until the case or bill of exceptions should have been settled and filed; and, with regard to the latter proceeding, such will still be the proper course, as, on the exceptions, where separately taken, being settled, judgment is signed by the adverse party, and the application then assumes the shape of an appeal. Where the motion is on a case, the stay applied for should be, not merely until after the settlement of the case, but also until some reasonable time after the hearing and final decision of the motion founded thereon. This will save the necessity of a second application for the latter purpose. Such also is the proper form of stay, where the application for a new trial is intended to be made at once, upon the judge's minutes. Forms of the order to be applied for in these cases, will be found in the appendix.

The advantage of applying to the judge, who tried the cause, is obvious. In the Superior Court it is made imperative, by No. 8 of the Special Rules; and it is also prescribed, that such stay must be obtained and served, within four days after the entry of judgment by the clerk, or before the insertion of the costs

by that officer in the judgment roll. In the other tribunals, however, it is competent for another judge to entertain such application. In this case, though equally made *ex parte* and without notice, it must be grounded on evidence, sufficient to satisfy the judge applied to, as to what actually took place at the trial, and likewise that the application is one proper to be granted.

Where the review of the decision of referees is applied for, this is, of course, the only mode of proceeding, as the referees, when once their report is made, are "*functi officio*," and have no further power, either to grant a stay or otherwise. The application, under these circumstances, will best be founded on the report itself, and the stay asked for should be the same as that upon a case for review of a verdict, "*mutatis mutandis*." A judge, out of court, generally speaking, has no power to grant a stay of proceedings of this nature, extending beyond the usual term of twenty days. All he can do is to grant an order to show cause, returnable in court. The application must be made to the court itself, or the party must give the usual security on an appeal, as provided by sec. 348. *Steam Navigation Company v. Weed*, 8 How. 49; see likewise *Otis v. Spencer*, 8 How. 171. In the first district, on the contrary, a judge at chambers is competent to entertain the application, as before mentioned. Under any circumstances, however, the application for such a stay must be made upon notice, and a series of *ex parte* orders cannot be granted. See *supra* under head of formal proceedings; see likewise, *Sales v. Woodin*, 8 How. 349, *Mitchell v. Hall*, 7 How. 490, *Anon.*, 5 Sandf. 656, and numerous other cases there cited.

In *Cochran v. Webb*, 4 Sandf. 653, a somewhat analogous proceeding was taken by the Superior Court, in holding, with reference to two cross actions as to the same parcel of real estate, that, in the event of the plaintiff in the first action succeeding on his alleged legal title, further proceedings on his part might be stayed, until the equitable issue in the other suit should be also determined. The special provisions, now inserted, allowing the pleading of an equitable set-off, in answer to a legal claim, have, in a great measure, neutralized the direct effect of this decision; but the general principle will doubtless hold good, with reference to the enforcement of judgment upon an issue of law, when issues of fact joined in the same action remain still untried and triable, should this state of circumstances occur.

The stay in question should be applied for as early as possible in all cases, with a view to preclude the plaintiff from serving notice of his judgment, and thereby limiting the time for appealing to the general term. See also Rule 8 of the Superior Court above noticed. Once obtained, such stay has the effect of stopping this, as well as all other proceedings, thus practically enlarging the time in question. See *Bagley v. Smith*, 2 Sandf. 651. An order to stay must be applied for as such, in terms, as the mere taking of exceptions, or making a case, has no effect whatever as a stay of interim proceedings, for the purpose of entering or enforcing the judgment, or otherwise. *Oakley v. Aspinwall*, 1 Sandf. 694.

When obtained, the order in question should be forthwith served upon the opposite party, when, and not till when, the stay is complete. It is, of course, competent for the latter, to move to vacate the order, if unduly obtained. If it be clearly shown, either that the stay has been obtained in manifest bad faith, or that the subject matter of the action will be imperilled by delay, the application might be successful, but, unless a very strong case be made out, it would probably be useless.

The rule of the Superior Court, above cited, provides for this contingency as follows: "The court, by order, may permit the judgment to be entered and collected, without prejudice to a motion to set aside a verdict, and may impose such terms on each party in respect thereof, as to the court may seem meet."

### § 217. *Motion on Judges' Minutes.*

The next subject to be considered, is the motion for a new trial upon the judges' minutes, a proceeding solely and exclusively applicable to cases where the trial has been by jury, and which can only be taken at the same term or circuit at which that trial has been had. The proceeding is a restoration of the old practice of motions for a new trial at the circuit, and appears more peculiarly applicable to those cases, in which manifest error, or manifest irregularity has taken place. If the question be one of real difficulty or doubt, it is more than probable that such application would scarcely be granted, but that a motion on a case, regularly made, will be held to be the proper course.



No papers are necessary beyond those used on the trial, and the opposite party must of course have notice of the application, as he will be entitled to be heard in opposition. The form and length of this notice are not prescribed. An order to show cause would seem to be the more advisable course, where an arrangement cannot be made with the opposite counsel, to bring on the motion by consent. The provision being comparatively recent, and the practice of moving upon a case become general, if not universal, no decisions upon its construction have as yet been reported, but it is possible that some difficulty may be experienced, in settling the exact course to be pursued under it. In the mean time, the works on the former practice should be consulted, and the old decisions may, in all probability, be held to govern the future course of proceeding. The judges' decision, whatever it may be, is, it will be seen, reviewable by appeal.

The question as to another class of motions, analogous to the present, in this respect, *i. e.*, that they do not require the preparation of a formal case, will be considered in the closing section of this chapter. The class alluded to is that of motions on the ground of surprise, or newly-discovered evidence.

### § 218. *Motion upon a Case, as to Facts.*

*General Characteristics.*—We now arrive at the more usual practice of reviewing the verdict of a jury, or the decision of the court, or referees, on a question of fact, on a case made and submitted for that purpose, a practice which was fast settling down into a regular and consistent system, although, as before stated, the point was left unprovided for by the Codes of 1848 and 1849. This conclusion was, however, only arrived at, as the result of numerous and occasionally conflicting decisions.

To enter into any lengthened citation of these authorities would be superfluous. They established, by a species of graduated progression, 1stly. That such review was obtainable, and 2dly. That the special term is the proper forum for that purpose. A short notice of them may not, however, be superfluous.

In the following cases it was held, that the verdict of a jury, or the decision of a single judge or referee, was reviewable by

the general term, in respect of errors of fact, as well as of errors of law: *Laimbeer v. Allen*, 2 Sandf. 648, 2 C. R. 15; *Pepper v. Goulding*, 4 How. 310, 3 C. R. 29; *Weed v. Raney*, 8 L. O. 182; *Nolton v. Moses*, 3 Barb. 31; *Vallance v. King*, Id. 548; *Clark v. Crandall*, Id. 612; *Krom v. Schoonmaker*, Id. 647; *Wilson v. Allen*, 6 Barb. 542; *Curley v. Wilkins*, Id. 557; and *Allen v. Way*, 7 Barb. 585, 3 C. R. 243.

The chief cases establishing the contrary doctrine, *i. e.*, that errors of fact were reviewable, and, as such, were properly cognizable by the special term, were *Haight v. Prince*, 2 C. R. 95; 2 Sandf. 723 (Note); *Nones v. Hope Mutual Insurance Company*, 5 How. 157, 2 C. R. 101, 3 C. R. 192; *Enos v. Thomas*, 5 How. 361, 1 C. R. (N.S.) 67; *Burhaus v. Van Zandt*, 7 Barb. 91; *Leggett v. Mott*, 4 How. 325, 2 Sandf. 720, 8 L. O. 236, 3 C. R. 5; *Cooke v. Passage*, 4 How. 360; *Willis v. Welch*, 2 C. R. 64; *Droz v. Oakley*, (or *Lakey*), 2 Sandf. 681, 2 C. R. 83; *Seely v. Chittenden*, 4 How. 265; *Lusk v. Lusk*, 4 How. 418; *Graham v. Milliman*, 4 How. 435; *Hastings v. McKinley*, 3 C. R. 10; *Crist v. The New York Dry Dock Company*, 3 C. R. 118; *Grigg v. La Wall*, 3 C. R. 141, 5 How. 158; *Hatfield v. Ross*; *Crist v. Dry Dock Bank*, 3 C. R. 141; *In re Fort Plain and Cooperstown Plank Road Company*, *Ex parte Ransom*, 3 C. R. 148; *Collins v. Albany and Schenectady Railroad Company*, 5 How. 435; *Benedict v. The New York and Harlem Railroad Company*, 3 C. R. 15, 8 L. O. 168; to which may be added the recent case of *Ball v. The Syracuse and Utica Railroad Company*, 6 How. 198, 1 C. R. (N. S.) 410. The latter conclusion may, therefore, be considered as having been established; before it was made, as now, the subject of express provision by the legislature.

A conflict of doctrine took place under the Code of 1849, as to whether a referee's report on the whole issue, was reviewable in respect of errors of fact, by the general, or by the special term. The former view was maintained in *Laimbeer v. Mott*, 2 C. R. 15; *Pepper v. Goulding*, 4 How. 310, 3 C. R. 29; and *Weed v. Raney*, 8 L. O. 182; the latter in *Haight v. Prince*, 2 Sandf. 723, 2 C. R. 95; *Leggett v. Mott*, 2 Sandf. 720, 4 How. 325, 8 L. O. 236, 3 C. R. 5; *Nones v. Hope Mutual Insurance Company*, 5 How. 157, 2 C. R. 101; *Crist v. The Dry Dock Company*, 3 C. R. 118; *Grigg v. La Wall*, 3 C. R. 141, 5 How. 158; *Hatfield v. Ross*; *Crist v. Dry Dock Bank*, 3 C. R. 141; *Morgan v. Bruce*, 1 C. R. (N.S.) 364; which combined series of

decisions seemed, for the time, to establish the contrary conclusion, notwithstanding the unequivocal provisions to the former effect, as contained in Rule 24, as it stood before the recent revision. Under the present amendments, however, a referee's report is reviewable, and reviewable only, on appeal to the general term, in all cases, and in respect of all objections; see *Simmons v. Johnston*, 6 How. 489; *Church v. Rhodes*, 6 How. 281; *Watson v. Scriven*, 7 How. 9.

The only exception to this rule is with reference to those courts of peculiar jurisdiction, such as the City Court of Brooklyn, in which there is only one judge, and that judge empowered by statute to grant a new trial, in cases within his cognizance. See *Goulard v. Castillon*, 12 Barb. 126. See, hereafter, under the head of Appeals.

### § 219. *Motions upon Exceptions, as to Law.*

*General Characteristics.*—If the new trial be sought on points of law only, the verdict of the jury on the facts as brought before them not being impeached, the course then to be pursued is the preparation and settlement of exceptions. As regards all mere formalities, in connection with the preparation and settlement of this document, the practice is precisely the same as that prescribed in relation to the settlement of a case, and the two will therefore be considered together, in the next subsequent section.

In its original framing, however, an essential difference exists, which will now be adverted to. A case for review on the facts, in general contains a full statement of all that actually transpired upon the trial, or, at least, of all material circumstances, as forming grounds for the verdict of the jury, or the decision of the court or referees. Exceptions, when separately prepared, and, under the recent amendments, the case on an appeal from the decision of the court or referees, are, on the contrary, documents of a much more restricted nature, and every statement of fact, not directly bearing upon the questions to be submitted to the court above, and absolutely necessary for presenting those questions in a proper shape, should be rigorously excluded. The practice on the preparation of a special verdict being, in this respect, identically the same, the cases on both will be cited in connection.

The requisites, on the preparation of a bill of exceptions, previous to the last amendment, are thus stated by the Court of Appeals, in *Price v. Powell*, 3 Comst. 322. A bill of exceptions should give a plain and concise statement of the facts, out of which the questions of law arise, and the evidence should not be set forth in detached and scattered parcels. If loosely prepared, every doubt about facts should be turned against the party making the bill.

The application of these principles is still more stringent in the case of a special verdict, which is to contain facts only, and not the evidence of facts, so as to present questions of law only to the appellate court. *Hill v. Covell*, 1 Comst. 522; *Sisson v. Barrett*, 2 Comst. 406; *Langley v. Warner*, 3 Comst. 327.

The same principles held good, with reference to a case, seeking to review a referee's decision, in respect of errors of law. Under such circumstances, those errors must be made fully apparent on the face of the case; and, if such review be sought in respect of errors of this nature only, the case should be settled accordingly, stating facts, and not the mere evidence of facts, so as to present nothing but questions of law to the appellate court. *Sturgis v. Merry*, 3 How. 418, 2 Comst. 189.

In *Livingston v. Radcliff*, 2 Comst. 189, 3 How. 417, the rule is similarly laid down, as follows: "As to questions decided by the referee, in receiving or rejecting evidence, and the like, the case is in the nature of a bill of exceptions, and, as to the merits, it is in the nature of a special verdict, which must find facts, and not the mere evidence of facts." Similar doctrines are laid down by the Court of Appeals, in *Esterly v. Cole*, 3 Comst. 502; and *Borst v. Spelman*, 4 Comst. 284.

In order to sustain exceptions, it is actually necessary that the objections on which a review is sought, should have been formally raised, upon the actual trial, when by jury, or in due time after the decision of the court or referee has been pronounced, where the trial has taken place in that form. See this subject considered, and numerous cases cited, in chap. I. of the present book, Sec. 196.

Nor can an exception be sustained, as ground for a new trial, when the defect thereby objected to has been subsequently supplied. See the same chapter and section, and the cases of *Westlake v. The St. Lawrence County Mutual Insurance Company*, *Bean v. Canning*, and *Bronson v. Winan*, there cited.

Where, however, exceptions have been formally taken in due time, the right to make a case embodying those exceptions in due time afterwards, is fully saved, and no formal order of the court is necessary. See *Huff v. Bennett*, 2 Sandf. 703, 2 C. R. 139, above cited.

Where exceptions had been actually taken in good faith at the trial, with a view of insisting upon them at bar, and in the appellate court, if necessary; but the formal leave to turn the case into a bill of exceptions, as requisite under the Code of 1849, had been inadvertently omitted, leave was given to cure the formal defect by amendment. *Oakley v. Aspinwall*, 1 Sandf. 694. The granting of such leave is, however, a matter resting entirely in the discretion of the court.

A total omission to make out a bill of exceptions, or to separate the questions of law from the questions of fact, so as to present the former in a separate and distinguishable form, will preclude a review in the Court of Appeals altogether. See this subject further considered, and numerous decisions on the subject cited, under the head of appeals to that court. On the primary appeal to the general term, errors of fact and of law may be reviewed in connection, and on the same hearing, but, as regards the former, they cannot be carried to the court of last resort. The record must, on the contrary, be purged of all that does not bear directly upon the question of law to be submitted.

*When Exceptions will not lie.*—Before entering upon the formal proceedings in reference to the settlement of a case or exceptions, it may be convenient to notice some few of the recent decisions, in relation to the question as to when specific exceptions, if taken, will be unsustainable; without pretending, however, to enter fully into the subject, which would involve a more extended consideration of matters of law, not merely as connected with, but as contradistinguished from matters of practice, than would be consistent with the general plan of the work. The subject has already been partially touched upon in chapter IV. of the present book, see. 205. See that section and the cases there cited.

Amongst the latest decisions will be found, then, the following.

In *Walrod v. Ball*, 9 Barb. 271, it was held that an opinion

expressed by a judge, upon an hypothetical case put by counsel, cannot be made the foundation of an exception.

Nor can the denial of a motion, for leave to amend upon the trial, *Brown v. McCune*, 5 Sandf. 224; *Phinck v. Vaughan*, 12 Barb. 215; or the giving of permission to the jury to take with them, when retiring to deliberate, a deposition which has been read in evidence. *Howland v. Willetts*, 5 Sandf. 219, affirmed by Court of Appeals, 31st December, 1853.

Nor will an exception to the decision of the judge, overruling an objection to a question, be available, unless material evidence was given in answer to that question, and which would be embraced in the objection.

An objection to the charge of the judge, on the ground of his having gone beyond the line of his duty, in commenting on the facts, is not the subject of exception, if no error of law be involved. *Bulkeley v. Keteltas*, 4 Sandf. 450. See, likewise, *Lansing v. Russell*, 13 Barb. 510; *The People v. Cook*, Court of Appeals, 12th April, 1852. In the last-mentioned case, the general principle is also laid down, that a bill of exceptions does not lie to a decision, when the matter rests in the discretion of the judge; the point there in issue being, the prevention of counsel from addressing the jury, there being no dispute about the facts, and no question of damages to be passed upon by them.

In a case where a feigned issue has been directed, questions of law arising upon the trial, cannot be raised, by way of exceptions, in the first instance. The only mode of review, under these circumstances, is by motion upon a case, and upon the same principles as a review on the facts. *Snell v. Loucks*, 12 Barb. 385; *Lansing v. Russell*, 13 Barb. 510. The same rule holds good in relation to the review of justices' judgments. *Spencer v. The Saratoga and Washington Railroad Company*, 12 Barb. 382. In both of these cases, the judgment will not be reversed for technical defects, nor unless there is a clear preponderance of evidence against it.

## § 220. *Preparation and Settlement of Case or Exceptions.*

*Preparation.*—The mode of preparation of a case, under any of the foregoing circumstances, is prescribed, *in extenso*, by Rules 15 to 19, inclusive, of the Supreme Court, those rules

applying equally to the preparation of exceptions, or special verdict, with the distinctions noticed.

The case, or other proceeding to be so settled, is, in the first instance, to be prepared by the party intending to make the motion. The mode of its preparation is, however, in several respects, different, when the review is sought in respect of questions of fact, or of mixed questions of law and fact, on a trial by jury on the one hand; or, on the other, when that review is sought exclusively on exceptions, or arises in respect of the decision of the court or referees, on a trial without a jury.

Where the cause has been tried by a jury, the case, or case and exceptions, to be so prepared, must contain a correct and literal statement of all that took place on the trial, giving the evidence in full, or, at least, such portions of it as relate, directly or indirectly, to the questions on which a review is sought, stating all the different exceptions taken throughout that trial, as and when they arose, and comprising, lastly, the charge of the judge and the verdict of the jury.

In the preparation of a bill of exceptions it may, it seems, be improper to insert the whole of the judge's charge, *in extenso*, unless the objection that, in that charge, the judge has gone beyond the line of his duty, has been taken, and can be sustained. *Bulkeley v. Keteltas*, 4 Sandf. 450.

Where, on the other hand, the review is sought in respect of the decision of the court, on a trial without a jury, the case or exceptions must be drawn in a more concise form, and so as to present only the exact questions of fact or of law, the ruling on which is sought to be impeached. To this extent, the parties may state the evidence in point, exactly as it was given; all beyond this will be superfluous, and may be stricken out. Provision to this effect is indeed made by sec. 268, as now amended, which prescribes that the judge, in settling the case, must briefly specify the facts found by him, and his conclusions of law.

When the case has been tried by referees, the preparation of the case should be on principles analogous to those last stated. The trial, and the review of that trial, is, in fact, to be conducted in the same manner as a trial by the court, under sec. 272. The evidence may often, with propriety, be stated a little more fully, where the decision is impeached on points of fact; but the referees will be equally bound to state the facts found by them,

and their conclusions of law. This practice is analogous to that previously prescribed by Rule 13 of the Superior Court, which provided that a party, seeking a review of this nature, must procure and furnish to the court a special report of the referee or referees, setting forth distinctly the facts found on the reference, and his or their decision upon the points of law arising in the cause.

*Service of Case or Exceptions.*—When prepared, a copy of the case or exceptions, of whatever nature, must be made and served upon the opposite party, the lines of the original and of the copy, being so numbered as that each shall correspond. All this must be done, and the copy served, within ten days after the trial, or notice of the judgment, as the case may be, unless such time be extended by order.

*Amendments by opposite Party.*—On receiving the copy thus served, the adverse party has ten days within which to peruse and consider it, and to prepare amendments thereto. These amendments must refer distinctly to the portions which are proposed to be altered, by express reference to the marginal numbers, and a copy of them must be served upon the attorney of the moving party, within such period.

*Notice of Settlement, by moving Party.*—On receiving the amendments, the latter, if he disagree thereto, may, within four days afterwards, serve his opponent with notice to appear before the justice who tried the cause, or before the referee or referees, when the trial has taken place in that form, and have the case and amendments settled. This notice must not be for less than four, or more than twenty days after service, and the exact time must be distinctly specified upon its face.

*Settlement by Judge, or Referees.*—Although the appointment must be so made, it is, in practice, rarely attended by the parties. The course more usually pursued, is to leave the case and amendments with the judge or referee, who settles it at his leisure. For this purpose, before leaving the papers with him, they should be revised, and his attention distinctly drawn to the different amendments, by notes in the margin, showing, in particular, which of those amendments are disputed, and, if so, on what grounds. In ordinary cases, this mode of proceeding will answer all purposes; but, if the amendments be of such a



nature as to render an actual argument upon them advisable, or if the judge's or referee's decision thereon be unsatisfactory to either party, it is competent for them to discuss the matter personally before him, and to obtain his deliberate settlement upon argument regularly had. In this case, the appointment originally made for settlement may either be actually attended, or a fresh meeting may be arranged for that purpose.

Where the judge, before whom the cause was tried, had died after the preparation, but before the settlement of a bill of exceptions, the court allowed the moving party to make a fresh case, embodying those exceptions. The proceedings on that case were to be carried on, as to amendments, notices, &c., as on an original case, the notice for settlement to be before any justice of the court. The moving party was directed to furnish that justice with the original minutes on the actual trial, or with a copy; and either side were to be at liberty to present to the judge affidavits, in respect to any thing which occurred upon the trial. *Morse v. Evans*, 6 How. 445.

It is, of course, competent for either party, if dissatisfied with the judge's settlement of the case or exceptions, to move the court that it be resettled, on affidavits showing what took place, and the errors committed on the settlement.

Such a motion will, however, be rarely advisable, as a very strong case indeed must be made out, before the court will interfere with a matter, so purely in the discretion of the judge, and on which he is, of necessity, so much more thoroughly informed, than can be the case with respect to any other judicial officer.

A motion for this purpose, when otherwise admissible, may be made, pending an appeal to the higher tribunal. It will not be necessary first to remit the record for that purpose. *Witbeck v. Waine*, 8 How. 433.

*Waiver of rights by delay.*—By Rule 16, the periods above mentioned are made positively imperative, unless extended by special order. The right, whether to make a case on the one hand, or to propose amendments on the other, will, accordingly, be gone, unless such proceedings be taken in due time; and if, in like manner, the notice to appear before the justice to settle the case and amendments, be not served within the four days limited, the right to object to those amendments will be lost, and they will be made as of course.

In *Doty v. Brown*, 3 How. 375, 2 C. R. 3, it was considered that the time for these purposes could not be extended, otherwise than by special motion. In *Thompson v. Blanchard*, however, 3 How. 399, 1 C. R. 105, it was held that such time might be indefinitely extended by the judge who tried the cause; and, in *Huff v. Bennett*, 2 Sandf. 703, 2 C. R. 139, this principle was extended to an order made by any judge. Such order will not, however, operate as a stay in other respects, if for a longer period than the twenty days prescribed by secs. 401 and 405.

Although, as below laid down, and on the authority of the cases there cited, leave may be granted to complete the formal preliminaries to a motion for a new trial, after the actual entry of judgment: still, in those cases in which the application itself has been delayed until after that period, by laches on the part of the applicant, the right may be lost by delay. The principle that a motion for a new trial, on other grounds than those of irregularity or newly-discovered evidence, cannot be made after judgment entered, is strictly laid down in *Hastings v. McKinley*, 3 C. R. 10; and the same conclusion is come to, in *Enos v. Thomas*, 5 How. 361, 1 C. R. (N. S.) 67. See, likewise, cases cited under section 221, in relation to the neglect of providing for leave to turn a case into a bill of exceptions, as the law stood on that subject, prior to the last amendment of the Code.

*Final disposition of case or exceptions when settled—Ulterior course on exceptions.*—The case or exceptions having been thus settled, the amendments made by the judge should be brought to the notice of the opposite party, and an opportunity given him to amend his copy. This having been done, a fair copy thereof, as finally settled, must be made, and be filed in the office of the clerk of the court, within, at the latest, ten days from the time it has been finally settled by the judge. This is made imperative by Rule 17, and the effect of any negligence in this respect will be, that the proceeding "shall be deemed abandoned," as thereby provided. Under the last amendment, it is no longer necessary that exceptions should be either signed or sealed by the judge, as heretofore required by 2 R. S. 422, sec. 75.

Notice of the filing of the case or exceptions, as above, should, of course, be given to the opposite party. If exceptions have been taken alone, and the review sought is exclusively on the law, any stay of proceedings by which such party may have

been restrained from proceeding to enter up his judgment, will thereupon be at an end, and he will be entitled to proceed to do so in due course. The decision of the questions raised on the exceptions will then come on in due form, in the shape of an appeal to the general term; as to which, see hereafter. The party excepting, should, accordingly, address himself beforehand, to the question of the security which it will be necessary for him to give, upon the appeal so taken. If he feels he can depend upon his opponent's courtesy, to give him reasonable time to perfect that security after the actual entry of judgment, no further order will be required. If, on the contrary, the case be conducted in a hostile spirit, application should be made for a further stay, suspending the issuing of execution on the judgment, when signed, for a limited period, in order to give time for the due perfection of the appeal. This application, as in the former instance, should, in all cases, be made to the judge who tried the cause, and has settled the bill of exceptions, though, as before shown, it may be made to any other, in case of necessity, the facts being shown by affidavit, which otherwise is not requisite. The order may be obtained *ex parte*, and must, of course, be duly served. If not obtained before judgment is actually signed, the opposite party will be entitled to issue execution, immediately upon the entry of such judgment, without regard to the losing party's intention to appeal; and he may do so, even if such appeal have actually been taken, unless the necessary security have been given. See hereafter, under the head of Appeals.

The old practice as to a demurrer to the evidence, appears to be entirely abolished, or, to speak more correctly, superseded by the review upon exceptions, in the manner above prescribed.

The question as to the separation of exceptions from a case, after a hearing on the facts, or of amendments consequent on the direction of the higher tribunal, will be considered in a subsequent section.

In *Wilson v. Allen*, 3 How. 369, 7 L. O. 286, 2 C. R. 26, it was considered that a case ought to be verified under No. 44 of the late Supreme Court Rules. The present contain no provision upon the subject. It is therefore clearly unnecessary.

*Power to complete case after Judgment, in certain cases.*—The above observations all proceed upon the assumption that a stay

of proceedings is obtained, and that the case, on which a new trial is sought, is made and brought to a hearing before the entry of judgment, according to the more usual practice. A neglect on this point, or a refusal on the part of the court to grant such a stay, will not, however, prejudice the appealing party. It has been repeatedly held that a case, so made, may be attached to the judgment roll, after the entry of judgment. See *Renouil v. Harris*, 2 Sandf. 641, 1 C. R. 125, 2 C. R. 71; *Lynde v. Cowenhoven*, 4 How. 327; *Schenectady and Saratoga Plank Road Company v. Thatcher*, 6 How. 226, 1 C. R. (N. S.) 380; *Gilchrist v. Stevenson*, 7 How. 273. By the Code of 1851, express authority was given for that purpose. On the revision of 1852, sec. 265 was greatly abbreviated, and the express permission was omitted, probably because it was thought unnecessary, the point having been previously settled under the measure of 1849, which contained no special provision for that purpose. It will be necessary, however, to make a special application to the court, by motion, in the usual manner, unless such permission have been previously given.

### § 221. *Hearing of Case when settled.*

On the case or exceptions being settled, and filed as above, the matter will then be ready for argument, before the special or general term, according to circumstances.

*Hearing by Special Term.*—Where the review sought is in respect of the decision of a jury, on questions of fact only, the case must, under ordinary circumstances, be set down on the special term calendar, and, under any, must be noticed for trial in due course. It takes its place on the calendar, and comes on in the same manner as a cause, although in strictness a motion. No papers are necessary to be prepared for the hearing, but the moving party must see that the original case is brought into court, and ready for the judge's use, at the time the matter is called on. The argument proceeds as usual; and, if a new trial be granted, it is, of course, competent to the adverse party to suggest, and to the court to impose conditions, where proper.

*By General Term, where optional.*—The above observations apply to a case, seeking a review of the decision of a jury on

matters of fact alone. If, however, the review so sought be of a mixed nature, and errors of law are also complained of, it rests in the option of the moving party to have that review made, so far as the exceptions are concerned, either by the general, or by the special term, in the first instance. Where the exceptions so taken are of importance, the former may be the appropriate course; where, on the contrary, they are comparatively unimportant, and the review on the facts is chiefly relied on, the latter mode of disposal will be the most expedient; and, by sec. 265, it is laid down as the rule, and the hearing by the general term as the exception.

The power to apply for a hearing by the general term in the first instance, is thus conferred by that section. After laying down, in general terms, that a motion for a new trial, on a case or exceptions, or otherwise, must, in the first instance, be heard and decided at the special term, it thus proceeds, "except that, when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard, in the first instance, at the general term, and the judgment in the mean time suspended; and, in that case, they must be there heard in the first instance, and judgment there given."

In the matter of *Welch*, 14 Barb. 396, it is laid down, in terms, that, where an order of the above nature has been granted, judgment cannot be correctly entered, until the court, at a general term, has decided upon the bill of exceptions. This seems indeed clear beyond a doubt, upon the express wording of the section, "suspending" the judgment till after that hearing.

Under the Code of 1851, the powers of the judge to direct a hearing by the general term in the first instance, extended to a case generally, and as regarded all the questions thereby raised, whether of law or of fact. It was accordingly held, under that code, that where, from the nature of the questions involved, or the amount in issue, the decision of the special term was not likely to terminate the cause; a hearing by the general term, in the first instance, would be granted on suitable terms, *Morris v. Brower*, 4 Sandf. 701; and in *Fellows v. Emperor*, 13 Barb. 92, it was held that, on such a review, the general term had power to decide all questions presented, whether of law or of fact. By the last amendment, however, the power to decide, in the first instance, on mere questions of fact, appears to be

withdrawn from the general term altogether, and the remedy now in question to be confined to exceptions only, as such.

The review by the general term, under the Code of 1851, was considered, in *Fellows v. Sheridan*, 6 How. 419, to be in the nature of a motion, and not of an appeal, so far as the question of costs was concerned.

What the exact effect of a hearing of exceptions in this form may be, under the section as it now stands, as regards proceedings ulterior to that review, seems somewhat doubtful. It appears clear, from the terms of that section, that the hearing in this form is in the nature of a motion, and not of an appeal; because an appeal on the law of the case, can only properly take place on the judgment, after it is matured, and the section expressly provides that this entry is to be suspended, until after the hearing of the exceptions. What then is the effect of that hearing? and does it preclude the excepting party, assuming his exceptions to be overruled, from bringing up the same questions for a second adjudication, by an appeal in regular form from the judgment, when entered? If this be the case, what, in effect, is the utility of the first hearing? if not, in what shape is the decision to be further reviewed? It seems clear that it cannot be taken up to the Court of Appeals, in the shape of an appeal from the judgment, as such; because such an appeal will not lie, except from an actual decision of the general term on that judgment, after it has been actually rendered; and, unless a second hearing take place on the points submitted by the exceptions, no such decision will ever have been made; for the actual ruling to be reviewed will, in fact, have been made prior to, not consequent upon the judgment, and, as such, cannot be reviewed by means of an appeal from the latter. The only mode in which the ultimate review seems then to be attainable will be by appeal from the original order of the general term, overruling the exceptions, a most inconvenient form of revision; or else, by means of a second hearing *pro formâ* on the same questions, on the renewed appeal from the judgment, as such, in the usual form, and upon the usual security; and, in the former case, what security is to be given, and how, and on what terms is execution on the judgment to be stayed, pending the review on the preliminary order? Will, too, the appeal from the order, if unsuccessful, preclude the party from raising the same questions a second time, on the appeal from the judg-

ment as such, to which he has a clear statutory right? These considerations appear important, and seem to render the more usual form, of a hearing by the single judge, in the first instance, the more advisable course in all cases, unless under very peculiar circumstances.

*Hearing by General Term, where imperative.*—When the review sought is in respect of the decision of the court without a jury, or of referees, the proceeding assumes, at the outset, the form of a regular appeal to the general term, under § 348, and must be so carried on: the case, settled as above, being annexed to, and forming part of the judgment record, precisely as with reference to exceptions taken in the ordinary form. This rule is now made general by the last amendment, in relation to all the superior tribunals, with the one single exception of those, in which there is in fact no general term, and where, in consequence, the report of a referee must be reviewed in the first instance by the judge of that court, on motion, as under the old practice, before it can be carried up to the higher tribunal by appeal. See *Goulard v. Castillon*, 12 Barb. 126.

*Practice of Superior Court.*—By the rules of this tribunal, the practice, on motions for a new trial on a case, is laid down with much greater detail than in those of the Supreme Court. By Rule No. 9, a similar practice was established to that now prescribed, with reference to a case and exceptions, and it is provided that, if the review be sought in respect of alleged errors of law as well as of fact, the former must be presented upon the case as well as the latter; which, in the event of the application for a new trial being denied, may afterwards be turned into a bill of exceptions, if such errors have been otherwise duly excepted to; and it would seem that this will be done as of course, in accordance with the principles laid down in *Huff v. Bennett*, before cited.

By Rule 10, it is provided, in analogy with the present general practice, that the case, so settled as above, must be heard at special term; but a restriction is imposed, that alleged errors of law will not be considered on that hearing, unless by the express direction of the justice before whom the cause was tried. Where, therefore, it is considered expedient that the exceptions on the law, as well as the review on the facts, should be consi-

dered on the same occasion, this direction should be applied for, at the time the case is presented for settlement. In cases where the questions of law are, as it were, subsidiary to those of fact, this course will be highly convenient; where, on the contrary, those questions arise in the shape of abstract propositions, it seems inexpedient; as the decision on the case, if a new trial be granted, may possibly render their consideration unnecessary. Indeed, under the latter circumstances, the direction of the judge may probably be denied.

By Rule 11 of the same court, it is expressly provided, that the order at special term granting or refusing a new trial, may be appealed from in the same manner; and that, in case of a refusal, the appeal from such order may be heard at the same time as the appeal from the original judgment, in respect of errors of law, if such errors exist, and exceptions have been duly taken; and, by Rule 12, the costs under these circumstances are specially provided for as follows, viz., that, in ordinary cases, both are to be treated as one appeal, but that the court may, in its discretion, give the usual costs of a motion upon the appeal from the order, if thought expedient, in addition to those upon that from the judgment. The former should, therefore, be asked for, on all occasions, at the time that the decision is delivered; or, if the parties be not in attendance, then afterwards, prior to the settlement of the costs.

The above practice must accordingly be pursued in the court in question, and appears to be, in all main respects, consonant with the recent amendments of the Code, so far as regards the review on questions of fact tried by a jury. In these cases it may, therefore, be a convenient precedent to follow, as respects proceedings in the other tribunals also. To judgments entered as the result of a trial by the court, or by referees, this mode of proceeding is, however, no longer applicable, under the recent amendments; an appeal to the general term being now the proper remedy in those cases.

### § 222. *Separation of Exceptions, when requisite.*

This proceeding may become necessary, where exceptions have, in the first instance, been incorporated in a case; and, a new trial having been denied upon the facts, it becomes necessary to extricate those exceptions from the accompanying state-



ments of fact, so as to present them in a pure and unincumbered form, to the superior tribunal, for its decision on the points of law involved.

This form of proceeding existed, prior to the distinct statutory provision now made for that purpose, in the stipulation, usually inserted, for leave to turn a case for a new trial, when made, into a bill of exceptions. Under the Code of 1849, it was a matter of necessity that this leave should be expressly stipulated for. In *Smith v. Caswell*, 4 How. 286, the court refused to allow this defect to be remedied, on a case so settled without stipulation; and the same view was acted upon in *Benedict v. The New York and Harlem Railroad Company*, 3 C. R. 15; 8 L. O. 168. In the latter case, however, a disposition to relax the strictness of this rule was manifested; and, in *Hastings v. McKinley*, 3 C. R. 10, this disposition was acted upon, though the general principle on which the stricter cases are grounded, was fully admitted; and, in *Hammond v. Hazard*, 10 L. O. 56, the liberal view of the subject was still further extended. Where exceptions, too, had been *bonâ fide* taken on the trial, but the formal leave for the above purpose had been inadvertently omitted, leave was given to cure the defect by amendment, in *Oakley v. Aspinwall*, 1 Sandf. 694.

Under the Code, as it now stands, this formal leave is no longer essential, and the only prerequisite to a separation of this description is, that the exceptions should have been taken in due time, and originally stated in the case. When so stated, a separate review on those exceptions seems claimable, as of right. The provision for that purpose is made by sec. 264 as follows: "If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made, under the direction of the court, or of a judge thereof."

The course, then, to be pursued, under these circumstances, is expressly prescribed by Rules 18 and 19 as last amended, which run as follows:

Rule 18. Where a party shall be entitled to turn a case into a special verdict or exceptions, he shall have thirty days, after notice of the decision thereon, to prepare and serve such special verdict or exceptions. The party upon whom the same shall be served, shall have twenty days to prepare and serve amendments; and, in case such amendments shall not be agreed to, the same shall be settled by one of the justices

of the court, on a notice to be given within ten days after service of such amendments.

Rule 19. In case such special verdict or exceptions shall not be served within the said thirty days, the prevailing party shall be at liberty to proceed, as though no special verdict or exceptions had been taken, and, in case no amendment shall be proposed and served within the twenty days allowed for that purpose, the special verdict on exceptions shall be deemed assented to, as prepared and served.

It is obvious from these provisions, that, under the above circumstances, precisely the same course must be pursued, as on the original settlement of a case, with no difference, except as to the extension of some of the prescribed periods, and particularly as to the original preparation of the document. These provisions seem also to effect an implied stay of all proceedings, on the part of the successful party, in cases where this course is admissible, for the thirty days originally allowed for the preparation of this document. Whether that stay is extendible, as of right, during the further periods allowed for the settlement of those exceptions, when prepared, is less clear. Such seems to be the intention of the rules, but still, until the question is settled by express decision, the obtaining a special order might be more prudent. When finally settled, or assented to by the opposite party expressly, or by default as above, the exceptions should be forthwith filed, and, at the very latest, within the ten days provided by Rule 17, or they will be deemed abandoned. On such neglect, or upon the filing of the exceptions, the opposite party will then be entitled to enter up judgment, and the appeal from that judgment will proceed in due course.

### § 223. *Resettlement of Exceptions, by express order.*

In certain cases, and to prevent a failure of justice, the appellate tribunal may order the resettlement of exceptions, originally as taken in an imperfect form.

Thus in *Livingston v. Miller*, 7 How. 219, where it appeared that certain questions of law were presented by exceptions at the trial, and were passed upon by the General Term, although such questions did not sufficiently appear by the bill of exceptions; the Court of Appeals, on motion, stayed the argument of the cause, to give the appellant an opportunity to apply to

the court below for a resettlement; and it was further held that the return, after such amendment of the exception, would be allowed to retain its original date of filing.

When, however, an argument has taken place, and judgment has been actually pronounced by the above tribunal, an application for the above purpose will come too late, and will not be granted. *Fitch v. Livingston*, 7 How. 410.

When a resettlement for the above purpose is necessary, or is otherwise advisable, the application must be made in due form, to the court below. The order for that purpose may be made by a single judge at special term, nor is it, it would seem, necessary to apply to the higher court to remit the record for amendment. *Witbeck v. Waine*, 8 How. 433. Of course, a copy of the exceptions, when resettled, must be returned in the usual manner to the court above, and, under these circumstances, and where that amendment takes place without a previous suggestion of the appellate tribunal, it may be more prudent to apply to the latter, for formal leave to substitute the amended for the original documents, on the return. Where the suggestion has proceeded from the appellate court itself, of course this further precaution will be unnecessary.

### § 224. *Result of decision on Case or Exceptions.*

In all the courts, an appeal may be taken from the decision of the special term upon a case, whatever that decision may be, in the ordinary form of an appeal from an order. Under the Code of 1851, that appeal might even be carried up to the Court of Appeals (see, however, *Moore v. Westervelt*, 1 C. R. (N.S.) 415); by the last amendment, the former practice is restored, and this is no longer feasible. Provision is, however, made by C. 135 of the Laws of 1854, in relation to appeals taken pending the temporary alteration of the law in this respect.

If, on the contrary, a new trial be granted, the cause is, as it were, remitted back to the stage of the original joinder of issue, and must be brought on a second time for trial, in regular form and in due course. The only difference between the second trial and the first, will be the clearer views which the parties will have, as to what will, or will not be considered as admissible, either in point of evidence or of argument. If the de-

cision on the motion have been in writing, it may be made use of for this purpose, and the judge may probably require a copy for his information, which should be in readiness accordingly. The date of the issue on the second trial will be that of the original joinder, without regard to the subsequent proceedings, and the cause will accordingly take a higher place on the calendar, and come on at an earlier period.

If the party who has applied for and obtained a new trial, neglect to proceed, it is competent for his adversary to do so, and set down the cause in due order, in the usual manner. *Gale v. Hoysradt*, 3 How. 47.

Where a new trial is granted on the defendant's application, it will, however, be necessary for him to serve a copy of the order on the plaintiff, before he can be in a situation to move to dismiss the latter's complaint, for not proceeding to trial. But, where the new trial has been granted on the plaintiff's application, the contrary is the case. *Robb v. Jewell*, 6 How. 276.

If a new trial be granted on the facts, of course the exceptions taken upon the original hearing are no longer of any practical operation. If, however, the application be refused, a further review may be obtained on those exceptions, which must be brought on in due course, when separated, in the manner before pointed out.

The fact that the cause has once been tried by a jury, does not preclude the right of either party to move for a reference, in a case involving the examination of a long account, where a new trial has been granted. *Brown v. Bradshaw*, 8 How. 176; 1 Duer, 635.

An amendment as to parties is obtainable also, on motion, where proper; but it will not be granted, it seems, on the motion for a new trial, but only on a special application. *Travis v. Tobias*, 8 How. 333.

## § 225. *Law as to granting a New Trial.*

Although the practice be altered, the law on the subject of granting or refusing a new trial, remains practically unchanged. The text books, particularly *Graham* on New Trials, and the works on the old practice should accordingly be referred to on

the subject. To enter into all the details of this interesting, but complicated branch of discretionary jurisdiction, would be beyond the province of the present work. A reference to a few of the recently decided cases may, however, be useful.

The provisions of the Revised Statutes, 2 R. S. 309, under which a new trial can be demanded, in ejectment cases, as a matter of right, were held to be unrepealed by the Code, in *Rogers v. Wing*, 5 How. 50; *Cooke v. Passage*, 4 How. 360; *Lang v. Ropke*, 1 Duer, 701, 10 L. O. 70; *Bellinger v. Martindale*, 8 How. 113. No more than two new trials can, however, be granted as of right, under this statute; one, on payment of costs, without showing any cause whatever, and one, where the court is satisfied that justice will be promoted. It was not the intention of the statute, that each party should have two new trials, although one should succeed at one, and the other at the next. *Bellinger v. Martindale*. If too, instead of a regular trial being had, the controversy between the parties be submitted, under sec. 372, the statutory right to a new trial will be gone. *Lang v. Ropke*, above stated. In relation to new trials in ejectment, not specially claimed under the statute, see *Briggs v. Wills*, 12 Barb. 567; *Lane v. Gould*, 10 Barb. 254.

The old principle stands good that, as a general rule, the verdict of a jury, or the decision of a single judge, or of referees, on questions of fact decided by them, are absolutely conclusive; if given or pronounced on sufficient, though conflicting evidence, consistently with that evidence, and without error or miscarriage in point of law. All three stand, therefore, practically on the same footing, with reference to the principles on which an application for a new trial may or may not be granted, on alleged error in fact.

The conclusiveness of the verdict of a jury, under these circumstances, is maintained, amongst other cases, in *Rathbone v. Stanton*, 6 Barb. 141; *McDonald v. Edgerton*, 5 Barb. 560; *Rice v. Floyd*, 4 How. 27; *Bulkeley v. Keteltas*, 4 Sandf. 450; *Stoddard v. The Long Island Rail Road Company*, 5 Sandf. 180; *Swift v. Hart*, 12 Barb. 530; *Bronson v. Wiman*, Court of Appeals, 12th April, 1835; affirming 10 Barb. 406; *Hager v. Danforth*, 8 How. 435. Where, however, there has been the least intermeddling or improper interference with the jury, or any of them, during the trial, it will vitiate the verdict. *Reynolds v. The Champlain Transportation Company*, 9 How. 7. The rule

as to the conclusiveness of the decision of the judge, in a cause tried by him without a jury, is equally clear and imperative. See that subject heretofore considered, and the cases cited, in chapter V. of the present book.

The same is the case as relates to the report of referees on similar questions. See this subject also fully considered above, in chap. VI. of the present division of the work, and numerous decisions there cited.

This rule holds good also, with reference to the report of arbitrators, *Olt v. Schroepfel*, 1 Seld. 482; and of commissioners in partition. *Doubleday v. Newton*, 9 How. 71.

When the report of referees is set aside, on motion, and is sent back for revision and correction; if they go beyond the bare correction of those errors, and reopen the case as to other items, they are bound to hear additional testimony, if offered. *Goulard v. Custillon*, 12 Barb. 126.

Objections omitted to be urged at the original hearing, will be considered as waived altogether, and cannot be made a ground for the granting of a new trial. See this point considered, and cases cited, in chap. I. of the present book, sec. 196.

The subject of the proper province of the court and jury respectively; of misdirection by the former, where impeachable; of errors committed in the submission or non-submission of questions to the latter; the granting of nonsuits, and of requests to charge; and, how far the want of a specific compliance with those requests, may or may not constitute grounds of error, for which a new trial may be granted—have also been fully considered, and numerous cases cited, in chap. IV., sec. 205.

The point as to how far objections may or may not be disregarded, or an amendment granted, without error, has also been treated of, in chap. I., secs. 195 and 196.

One of the most ordinary grounds for the granting of a new trial, is the admission of improper evidence. As a general rule, such an admission will form ground for a new trial. This is styled "the safe rule," in *Clark v. Crandall*, 3 Barb. 612.

In *Weeks v. Lowerre*, 8 Barb. 530, the rule as to the admission of objectionable evidence, is laid down in the strictest terms; and it was held that, if any illegal testimony goes to the jury, which might have weighed with them, on any ma-

terial point, there *must* be a new trial. See, likewise, *Boyle v. Colman*, 13 Barb. 42.

A similar conclusion as to the admission of irrelevant evidence, is thus stated by *Welles, J.*, presiding at general term, in *Dresser v. Ainsworth*, 9 Barb. 619: "The admission of irrelevant evidence is error, and I see no way of avoiding a new trial on this ground, as it is impossible to say what influence the evidence may have exerted on the minds of the jury. (*Clark v. Vorce*, 19 Wend. 232.)"

The above rule is, however, open to qualification, in one respect, viz.: That, as to the materiality of the evidence objected to, the admission of evidently immaterial evidence, or a mere decision in favor of the admission of evidence not subsequently given, will not form ground for a new trial, if it clearly appear that the error of the judge could not have injured the party. *Vallance v. King*, 3 Barb. 548.

In *McKnight v. Dunlop*, 1 Seld. 537, it is held that, if improper testimony is received, and the question of its admissibility reserved until the evidence is closed, no objection being taken to that course, and the jury is then instructed to disregard it, the objection, as to its conditional reception, cannot afterwards be taken. Whether the same rule will hold good, when testimony is objected to at the time, and the objection overruled, seems more doubtful, and was not expressly ruled in that case, though the court inclined to that view of the subject also.

The rule as to the admission of evidence, is stated in both its aspects, in *Murray v. Smith*, 1 Duer, 412, in the following terms: As a general rule, when improper evidence has been admitted upon a trial, and an exception duly taken, a new trial must be granted, if the evidence had any bearing upon the issue, and could possibly have had an influence upon the verdict. But, when the cause is before the court upon a case, although it may appear that improper evidence has been admitted, the verdict will not be disturbed, if the court is satisfied that substantial justice has been done, and that, excluding the improper evidence, the same verdict ought to have been, and would have been given.

The principle lastly laid down, as above, is also sustained by *Allen v. Way*, 3 C. R. 343, in which it is held that, where exceptions in point of law appear, in connection with alleged errors of fact, the court will not hold themselves strictly bound to grant a new trial, though error in law be established, but will

treat the application in the light of an ordinary motion on a case; and, if it appear that objectionable evidence, though improperly admitted, could not possibly have prejudiced the defendants, a new trial may be denied.

An error of law in the judge's charge, may, too, be disregarded, as immaterial, when it appears that the question of fact, on which alone the cause depended, has been properly submitted by him to the jury. *Stoddard v. The Long Island Railroad Company*, 5 Sandf. 180.

So, too, it was held, in *Lyon v. Marshall*, 11 Barb. 241, that it was no ground of error, that the judge, in his charge to the jury, stated, as law, what had nothing to do with the case.

It was also held by the Court of Appeals, in *Bogart v. Vermilya*, 12th April, 1853, that an immaterial issue, however it may be found, has no effect upon the judgment, where the rights of the parties are established by the finding upon material issues. It was likewise held, by the same court, at the same term, in *The People v. Cook*, that a judgment will not be reversed on exceptions, for an irregularity which, it is manifest, could have had no tendency to injure the party excepting.

In *Ledyard v. Jones*, 30th December, 1852, it was likewise held, by the same court, that, where the judge had laid down the rule of damages too favorably for the plaintiff, the judgment would not be set aside, even on exceptions, where the verdict was for a less sum than the plaintiff, upon the conceded facts, was entitled by law to recover.

Where, too, a reduction of the plaintiff's judgment had been ordered, and it afterwards appeared that the original amount was correct, it was held that the reduced judgment could not be reversed, on the defendant's appeal, because he was not prejudiced by that reduction, or by an uncertainty in the record, in not showing what specific items of account the general term had rejected, in ordering that reduction. *Weisser v. Denison*, Court of Appeals, 18th April, 1854.

Where the jury is correctly instructed on the questions of law, a doubt concerning the weight of evidence will be no sufficient reason for disturbing their verdict. *Stroud v. Frith*, 11 Barb. 300.

The exclusion of proper evidence, tendered by the unsuccessful party, will, as of course, form ground for a new trial. *Robison v. Lyle*, 10 Barb. 512.

In *Hicks v. Foster*, 13 Barb. 663, a new trial was granted, on



the ground that the judge had charged, in slander, that the jury had a right to take into consideration, the legal expenses incurred by the plaintiff, in order to vindicate her character.

The rule as to granting a new trial, on the subject of excessive damages, is strict, but not inflexible. To warrant the court in setting aside a verdict on that ground, the damages must be so extravagant as to manifest that it was the result, in no degree, of judgment, but of passion, or prejudice, or corruption; and the interference of courts, on that ground, in actions of tort, is very rare. *Hager v. Danforth*, 8 How. 435.

In *Collins v. The Albany and Schenectady Railroad Company*, 12 Barb. 492, the same is laid down as the general rule. It was held, however, that, when the damages are so large, or so small, as to force upon the mind a conviction that, by some means, the jury have acted under the influence of a perverted judgment, it is the duty of the court to grant a new trial; and the jury having, in that case, awarded damages for an injury, of more than double the amount which could by law have been awarded, if the accident had proved fatal to the plaintiff, their verdict was set aside. The same course was adopted, and similar principles laid down, by the Superior Court, in *Murphy v. Kip*, 1 Duer, 659.

The power of the court, under these circumstances, to reduce the verdict to a reasonable amount, and, if the plaintiff stipulate to reduce the judgment to that amount, to deny the motion for a new trial; but, if not, to grant one, is maintained in *Collins v. The Albany and Schenectady Railroad Company*, above cited.

The courts will impose some limitation on the right of applying for a new trial, even where the circumstances are doubtful. Thus, where three successive verdicts had been rendered, on feigned issues, against a defendant, in a suit for divorce on the ground of adultery, a fourth trial was denied by the Court of Appeals, although the evidence was purely circumstantial, and not entirely conclusive. *Ferguson v. Ferguson*, Court of Appeals, 18th April, 1854.

A joint verdict against several tortfeasors, upon several counts, all of which are good, cannot be reformed, upon an application for a new trial, by limiting it to particular counts, or particular defendants; but if, upon any one count, and as against any one defendant, it is contrary to law or evidence, it must be set aside. *Carpenter v. Sheldon*, 5 Sandf. 77.

The costs to be paid on obtaining a new trial are, the costs of the former trial, and the costs of the application; those costs being in the nature of a trial fee, and not of a motion. *Van Schaick v. Winne*, 8 How. 5; *Ellsworth v. Gooding*, 8 How. 1.

In the latter of these cases, it is considered that an allowance, granted by the court, on the first trial, is to be considered as part of the costs to be so paid. In *Hicks v. Waltermire*, 7 How. 370, the contrary conclusion is come to, on the ground that such extra allowance can only be allowed on a judgment or recovery; and, where a new trial is granted, there can be no certainty that either will take place. The latter seems, on the whole, to be the preferable view. See this subject hereafter considered, under the head of Costs.

## § 226. *Motions, not grounded on Case or Exceptions.*

It remains to notice, lastly, a class of applications for a new trial, the practice under which is not governed by the special provisions of the Code, or of the Rules, as applicable to it, but which, on the contrary, remain precisely as they were under the old practice. The distinction to be drawn between this class of motions, and those considered in the previous portions of this chapter, is, that the former are in no wise grounded on a case or exceptions prepared for that special purpose, but are, on the contrary, ordinary applications in the cause, made in the usual manner, on the ordinary notice, and grounded on affidavits, or on the pleadings and proceedings.

The class alluded to are applications for a new trial, on the grounds of irregularity, surprise, or newly-discovered evidence. The first of these three heads, is, however, provided for by the last amendment of the Code, and its consideration has been anticipated under sec. 216, treating of motion for a new trial on the judge's minutes. It is evident that, in almost all instances, that form of application will be the most proper, in that description of cases. The irregularities, if any have been committed, will then be fresh in the mind of the judge, and the actual proceedings on the trial will necessarily form the ground, on which the motion is made. As a general rule, too, objections of this description will be held to be waived, unless taken immediately, and urged in the most expeditious and expedient

form. In cases, however, should any such occur, where the irregularity committed has remained latent, an application, grounded on affidavits, may possibly, though not probably, be entertained at a subsequent period.

Motions on the ground of surprise, or newly-discovered evidence, stand on ground wholly different from the above, as they necessarily proceed on facts, external to those which transpired at the actual trial, and which therefore require to be proved, and can only be proved, by external evidence.

In applications of this nature the usual notice of motion must of course be given, and a stay of proceedings may be applied for, if necessary. The facts as to the surprise, or as to the discovery of new evidence, on which the motion is grounded, must be shown, fully and distinctly, by affidavit. The strongest possible case must be made out in either event, the application being of a nature which the court will not be disposed to grant, unless its interference be shown to be absolutely indispensable, to prevent a failure of justice. It must also be shown, distinctly and affirmatively, that the motion has been made with all practicable speed, after the surprise complained of, or after the discovery of the additional evidence sought to be introduced. The nature of the proof, of the benefit of which the applicant has been deprived, must be clearly and unmistakably indicated, and it must be proved that such proof is material to the issue; and not merely this, but enough ought to be shown, to raise, at the least, a fair and *bonâ fide* inference, that, had the surprise not occurred, or had the newly-discovered evidence been introduced, the result of the trial might, and probably would have been different. Unless all these conditions be fulfilled, the presumption in favor of the past proceeding will be almost irresistible, and the burden of negating that presumption lies, of course, upon the applicant.

The motion is, of course, cognizable in the usual manner, by the single judge, sitting at special term. Before the Code, the motion was, on the contrary, an enumerated motion. The order granting a new trial on these grounds, is not appealable. *Seely v. Chittenden*, 10 Barb. 303. See hereafter, under the head of appeals from orders.

In *Seely v. Chittenden*, 4 How. 265, affirmed as above, 10 Barb. 303, the law of granting a new trial on the ground of newly-discovered evidence, will be found treated of *in extenso*.

Testimony merely going to impeach a witness sworn on the former trials, will not form ground for a new trial, on the ground of newly-discovered evidence. Nor will a new trial be granted to a plaintiff, on an allegation that he was surprised by the evidence of a witness for the defendant, in a case where it appears that he has been informed, before suit brought, that the defence would be the fact stated by that witness, and the evidence given on the trial has corresponded with that statement. *Meakim v. Anderson*, 11 Barb. 215.

A motion for a new trial on the above grounds, may, it was held in *Mersereau v. Pearsall*, 6 How. 293, be made after judgment entered, and even after that judgment has been affirmed on appeal; but, if the grounds of that motion were known to the parties, at the time such appeal was argued, without any steps being taken, the motion will be denied; nor will the application be granted, at that period, on a mere allegation that a witness was mistaken or surprised on his examination, and, especially, where the testimony of that witness was merely cumulative.

Although a motion for a new trial may be grounded on alleged irregularity or surprise, as regards the evidence, it will not be entertained on any alleged miscarriage on the part of the judge. The decision of the latter can only be corrected on a case or bill of exceptions, in the usual form. *Craig v. Fanning*, 6 How. 336; *Wilcox v. Bennett*, 10 L. O. 30.

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## CHAPTER VIII.

### PROCEEDINGS BY PREVAILING PARTY, BETWEEN TRIAL AND JUDGMENT.

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#### *General Remarks.*

THE proceedings to be taken on the part of the losing party, before the actual entry of judgment, with a view to obtain the revision of the decision of the court, jury, or referees, on questions of fact, or to place exceptions on the record, with the view of obtaining a similar revision, on points of law, by appeal,

having thus been considered: the intermediate proceedings that are, or may be necessary, on the part of the prevailing party, remain to be dealt with, before passing on to the actual entry of judgment and its consequences, the subject of the next book.

### § 227. *Minutes of Judgment, Amendments, &c.*

*Amendment of Verdict.*]—This proceeding, though admissible, is of comparatively rare occurrence.

In *Burhaus v. Tibbetts*, 7 How. 21, an application of this nature was granted, and the following general rules are laid down. The verdict of a jury may be amended or corrected, so as to conform to the facts, where there is no doubt as to such facts, either by certificate of the judge or otherwise, and of the real intentions of the jury. Where, however, the slightest doubt exists as to what transpired at the trial, or, if any exist that the whole case has been disposed of by the court and jury, an amendment should not be allowed.

A joint verdict against defendants in tort, is not amendable, and, if impeachable upon any material points, it must be set aside. *Carpenter v. Sheldon*, 5 Sandf. 77.

The motion for the above purpose is usually made by the prevailing party, at or immediately consequent upon the trial itself, and without any special notice. If, however, it be delayed till a later period, the opposite party must be noticed, and the application brought on in the usual manner.

*Minutes of Judgment, in Equity Cases.*]—In ordinary causes, no special preparation of the minutes of the judgment to be entered will be necessary. In equity cases, however, or in others, where the judgment embraces special relief, it may be necessary or convenient, for the prevailing party to prepare his minutes of the decree or judgment to be entered, and serve a copy on the opposite party, with a notice to attend before the judge who tried the cause, at some specified time, in order that such minutes may be settled by him. The opposite party may, of course, either alter the minutes served, or prepare counter minutes on his part, with a view to such settlement. The appointment being attended, the minutes on both sides may either be submitted to and settled by the judge, at the time, or left with him for settlement at his leisure. If, on his settlement

of such minutes, any questions arise, it is competent for the party dissatisfied to bring such questions again before him, on an application for resettlement, notice being, of course, given to his opponent. If, on such resettlement, the judge persevere in the view claimed to be erroneous, there seems to be no further remedy, except an appeal from his decision, in due form, either in the shape of one from the judgment itself, or from his order, on the application for a resettlement, which order should be entered accordingly, where the former course cannot be pursued. These proceedings are ordinarily, and will be most conveniently taken, before such judge at chambers. There is, however, no obstacle to their being taken in actual court, and to the cause being put on the calendar for that purpose, according to the old practice in chancery, where that course is considered desirable, though this will rarely be necessary, except in cases of more than usual complication and importance.

### § 228. *Special Verdict—Verdict subject to opinion of Court, &c.*

*General Observations.*—The foregoing observations apply to the settlement of the minutes of a decree or judgment pronounced, with respect to which no further action is necessary, except the mere ministerial act, of dictating the precise terms, in which the judgment actually pronounced, is to be properly entered. The questions as to special verdict, or verdict subject to the opinion of the court, fall, however, under a different category, inasmuch as no judgment can there be entered at all, until the questions thus reserved have been duly disposed of. Of both these proceedings, the prevailing party has the conduct, and both are, in all respects, the same as under the former practice, with this distinction, that the proceeding by special verdict has never been intermitted under the Code, since its original passage, whereas the practice of entering a verdict subject to the opinion of the court, has been in abeyance under the measures of 1848 and 1849, and was only restored in terms, by the amendment of 1851.

*Reservation of Cause for Argument, &c.*—It may be safe, when the case assumes either of these forms, to ask for the entry of

an order that "the cause be reserved for argument or further consideration" (see *Ball v. The Syracuse and Utica Railroad Company*, 6 How. 198; 1 C. R. (N. S.) 410); but it seems, in no respect, to be absolutely necessary. The very proceedings themselves, import, in their nature, a reservation of this description.

This mode of reservation of the cause, though specially provided for by the Code, seems to have fallen through, as respects its practical working. With the exception above noted, not one single case appears in direct relation to the construction of this provision, or arising under it. The phraseology appears to have been retained, on the last amendment of the Code, for no particular reason, further than that it was contained in the amendment of 1849. To trial by jury, the connection by which it is placed, it seems totally inapplicable, inasmuch as the jury, once separated, cannot be reassembled. It more probably was intended to bear reference to the power of the court, on trials of equity cases, or issues of law, on which the decision is reserved, to order a re-argument on points on which doubt is entertained; or to applications to the court in similar cases, and particularly in those of an equitable nature, for settlement of the minutes of the proper decree or order, before its actual entry. In cases of this description, it was not unusual, under the old practice, to have the cause called on afresh, for the purpose of arguing questions arising upon the proposed minutes, and having them regularly disposed of by the court, and the words in question may probably have been introduced with a view to this practice. In the Code of 1849, they may possibly have had the operation of keeping alive the old practice of entering a verdict, subject to the opinion of the court; and, in that sense, their applicability to trial by jury might well have been maintained. Under the last amendments, however, this practice being restored in terms, they seem to become surplusage, except, possibly, in so far as they may be held declaratory of the power of the court, to grant a stay of proceedings upon the trial, until any reserved questions may have been disposed of: a point of jurisdiction so obvious, that it did not seem to need any declaration whatever.

*Preparation and Settlement of Case or Special Verdict.*—The opinion of the court on a verdict, can only be obtained, as under

the former practice, on a case duly made. The case, for this purpose, must be prepared and settled, like that on the part of the losing party, as detailed in the last chapter. The facts on which the opinion of the court is sought, and the questions for their consideration, must be presented in a manner precisely analogous, and no fresh observations appear, therefore, to be necessary upon the subject.

The mode of settlement of a special verdict is also substantially the same, as respects the formal proceedings, and it is, therefore, equally unnecessary to do more than to refer to the last chapter on that head. Rule 19 should, however, be specially noticed, providing that, where a party shall be entitled to turn a case into a special verdict, and shall neglect to do so for thirty days, the prevailing party shall be at liberty to proceed as though no step had been taken, and also that, if no amendment be proposed within twenty days, the document, as prepared, shall be deemed assented to.

As respects, however, the original preparation of that document, a most material distinction is to be drawn. The evidence bearing on the points, on which the opinion of the court, or a review of its decision is sought, is not only admissible but proper to be stated upon a case, exactly as that evidence was delivered; a detailed statement of such evidence is, on the contrary, inadmissible in the preparation of a special verdict. The facts which have been found should alone be stated on the latter, so as to refer to the court the consideration of questions of law only, unmixed with discussions on points of fact. See *Hill v. Covell*, 1 Comst. 522; *Sisson v. Barrett*, 2 Comst. 406; *Langley v. Warner*, 3 Comst. 327, before cited; also *Livingston v. Rudcliff*, and three other cases, 2 Comst. 189, 3 How. 417. This distinction should be carefully attended to, and the statement of the facts found by the jury, made as succinct and clear as possible, on the original preparation of the document.

*Hearing of Case or special Verdict.*—The case, or special verdict, when duly settled, must be set down for argument before the special term; the latter in the form of a motion for judgment thereon. A copy of the special verdict or case must also be served upon the opposite party, at least eight days before the argument. The duty of making this service, and also of



furnishing the papers for the use of the court, falls, as regards a special verdict, upon the plaintiff, as regards a case, upon the party making the motion. See Rule 28 of the Supreme Court. At first sight, the application for judgment on a special verdict would seem, as an enumerated motion, to be cognizable by the general term, under Rules 27 and 28; but those rules are evidently controlled by sec. 265, of the Code, which provides the contrary as the rule; with the exception, that "Where, on a trial, the case only presents questions of law, the judge may direct a verdict, subject to the opinion of the court at a general term, and, in that case, the application must be made to the general term."

If the application for the above purpose be heard before the special term, it will not, of course, be necessary to print the papers. If, on the contrary, the general term be the forum prescribed, it seems evident that the papers must be printed, and points regularly prepared, according to the practice in appeals to that tribunal, as prescribed by Rule 29. This seems to follow, as an evident conclusion from the nature of such hearing, which, although not in the form of an appeal, is evidently, for practical purposes, a substitute for that proceeding, with the omission of the intermediate stage of a hearing at special term. Rule 28 also provides that, in cases reserved for argument or further consideration, no case need be prepared in writing, unless by direction of the justice who tried the case; and, that the party, on whose motion the case is reserved, shall furnish the papers for argument. A motion of this nature, where made, is of course a non-enumerated motion, and should properly be made before the judge who tried the cause, at special term, or, in the First District, at chambers. See, however, former observations as to this proceeding.

The decision of either special or general term, when pronounced, should be entered as an order by the prevailing party, who will then proceed to sign judgment accordingly, in due course. It remains shortly to notice the preliminaries to this latter proceeding.

### § 229. *Other Proceedings.*

*Taxation of Costs, &c.*—The bill of costs of the prevailing party must, of course, be prepared, and two days' notice of

taxation must be given to the opposite party. The application for an allowance, under sec. 308, must also be made at this stage of the cause. See both these subjects fully considered in subsequent chapters, under the heads of Judgment and Costs. They are, however, alluded to here, to draw the attention of the student, at this juncture, to the necessity of being fully prepared on the former head, and of making the application for the latter purpose in due time, where such application is admissible.

*References in certain Cases.*—In cases of foreclosure and partition, and others of an analogous nature, such as equitable proceedings for the purpose of enforcing an account, &c., a reference will probably be directed at the original hearing, to report the facts of the case, for the information of the court, before the final entry of the judgment pronounced. In strictness, these proceedings might be held to belong to this period of the cause, but it may be more convenient to notice them under the head of Judgment, to which title, accordingly, their consideration is deferred. They are, in fact, rather of a consequential, than of a preliminary nature, and answer to the reference to a master, under a decree in chancery, under the former practice, and to the subsequent winding up of the proceedings, under his report, when made, by means of a final decree or order, on further directions.

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END OF VOLUME I.







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